

BIENNIAL REPORT  
of the  
**ATTORNEY GENERAL**  
**STATE OF FLORIDA**

From January 1, 1969, through December 31, 1970

EARL FAIRCLOTH  
*Attorney General*



Tallahassee, Florida

1971

### CONSTITUTIONAL DUTIES OF THE ATTORNEY GENERAL

The revised Constitution of Florida of 1968 sets out the duties of the Attorney General in Subsection (c), Section 4, Article IV as:

"... the chief state legal officer."

By statute, the Attorney General is head of the department of legal affairs, and supervises the following functions:

Serves as legal advisor of the Governor and other Executive Officers of the State and State Agencies.

Defends the public interest.

Represents the State in legal proceedings.

Keeps a record of his official acts and opinions.

Serves as a reporter for the Supreme Court.

Assembles the Circuit Judges in biennial session to consider the betterment of the Judicial System, including recommendations for Legislature.

Reports to the Governor, for transmission to the Legislature, on the operation of laws of the last previous Session, including decisions of the courts affecting these laws.





ROBERT L. SHEVIN  
ATTORNEY GENERAL

STATE OF FLORIDA  
DEPARTMENT OF LEGAL AFFAIRS  
OFFICE OF THE ATTORNEY GENERAL  
THE CAPITOL  
TALLAHASSEE, FLORIDA 32304

August 6, 1971

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY  
HONORABLE REUBIN O'DONOVAN ASKEW  
GOVERNOR OF FLORIDA

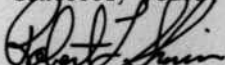
DEAR GOVERNOR:

The Biennial Report of the two preceding years from January 1, 1969, through December 31, 1970, is herewith submitted. This report is directed to you as required by the constitutional mandate requiring each officer of the Executive Department to make a full report of the official acts of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the Legislature or whenever the Governor shall require a report.

This report contains the opinions rendered by my predecessor, Attorney General Earl Faircloth. Also included are constitutional amendments ratified at the general election in November, 1970, the constitutional and statutory responsibilities of the Attorney General, and the personnel of the Department of Legal Affairs.

A table of statute and constitution sections cited in the opinions and an alphabetical subject index may be found in the last portion of the report.

Sincerely yours,



Robert L. Shevin  
Attorney General

RLS/Fw

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|                             |            |
|-----------------------------|------------|
| JOSEPH BRANCH .....         | 1845-1846  |
| AUGUSTUS E. MAXWELL .....   | 1846-1848  |
| JAMES T. ARCHER .....       | 1848-1848  |
| DAVID P. HOGUE .....        | 1848-1853  |
| MARIANO D. PAPY .....       | 1853-1860  |
| JOHN B. GALBRAITH .....     | 1860-1868  |
| JAMES D. WESTCOTT, JR. .... | 1868-1868  |
| A. R. MEEK .....            | 1868-1870  |
| SHERMAN CONANT .....        | 1870-1870  |
| J. P. C. DREW .....         | 1870-1872  |
| H. BISBEE, JR. ....         | 1872-1872  |
| J. P. C. EMMONS .....       | 1872-1873  |
| WILLIAM A. COCKE .....      | 1873-1877  |
| GEORGE P. RANEY .....       | 1877-1885  |
| C. M. COOPER .....          | 1885-1889  |
| WILLIAM B. LAMAR .....      | 1889-1903  |
| JAMES B. WHITFIELD .....    | 1903-1904  |
| W. H. ELLIS .....           | 1904-1909  |
| PARK TRAMMELL .....         | 1909-1913  |
| THOMAS F. WEST .....        | 1913-1917  |
| VAN C. SWEARINGEN .....     | 1917-1921  |
| RIVERS BUFORD .....         | 1921-1925  |
| J. B. JOHNSON .....         | 1925-1927  |
| FRED H. DAVIS .....         | 1927-1931  |
| CARY D. LANDIS .....        | 1931-1938  |
| GEORGE COUPER GIBBS .....   | 1938-1941  |
| J. TOM WATSON .....         | 1941-1949  |
| RICHARD W. ERVIN .....      | 1949-1964  |
| JAMES W. KYNES .....        | 1964-1964  |
| EARL FAIRCLOTH .....        | 1965-1970  |
| ROBERT L. SHEVIN .....      | 1971-..... |

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Louie L. Wainwright, Jr.—Executive Assistant

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Bjarne Andersen  
Nelson E. Bailey  
Bucky Bishop  
John Bottcher  
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George R. Georgieff  
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William W. Herring  
Ken Hoffman  
John Hogenmuller

Ron Jamis  
James P. LaRussa  
Halley Lewis  
Raymond L. Marky  
Strome Maxwell  
Joseph C. Mellichamp  
Charles W. Musgrove  
J. Robert Olian  
Robert Olive  
Phil A. Pacyna  
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Barry Scott Richard  
Ron Sabo  
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Bob Vossler  
Winifred L. Wentworth  
John Zebedee

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Daniel S. Dearing, Chief Trial Counsel

## ASSISTANT ATTORNEYS GENERAL

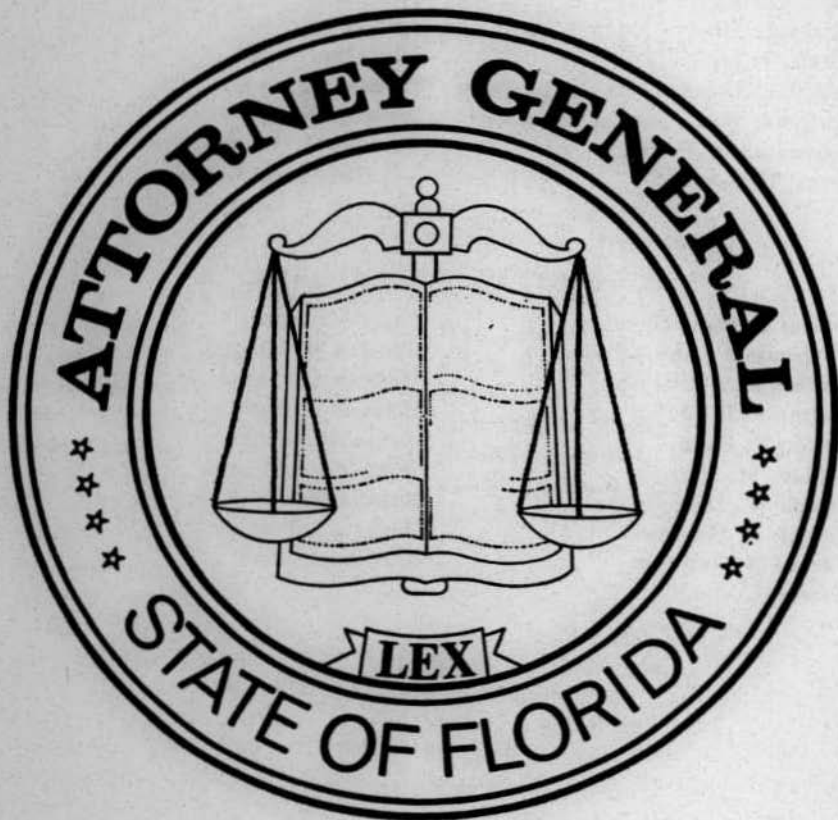
Andersen, Bjarne  
Bishop, Bucky  
Bottcher, John  
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Hawkins, Rebecca Mrs.  
Hoffman, Ken  
Hogenmuller, John  
Lewis, Halley

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Barry Scott Richard  
Bruce L. Scheiner  
J. Robert Olian



*Robert L. Shevin*  
*The Capitol*  
*Tallahassee*



BIENNIAL REPORT  
of the  
ATTORNEY GENERAL

State of Florida

January 1, 1969, through December 31, 1970

069-1—January 7, 1969

EXECUTIVE DEPARTMENT

LIEUTENANT GOVERNOR—FIXING OF COMPENSATION

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

QUESTIONS:

1. May the state personnel board fix the compensation for the lieutenant governor whose office was created pursuant to the 1968 revised State Constitution?

2. Is the state planning and budget commission authorized to allocate funds from the deficiency appropriation to provide the salary for said officer?

Both questions are answered in the affirmative.

The office of lieutenant governor was created after the last meeting of the legislature by a constitutional revision adopted by the electorate on Nov. 5, 1968, and effective Jan. 7, 1969. AGO 068-108 Dec. 16, 1968, this office; Advisory Opinion to the Governor, Fla. 1968, 217 So.2d 289. The law clearly provides that the salary for officers whose positions are not specifically indicated in the appropriations acts and are not otherwise provided in § 282.051(2)(a)1. or 2., F. S. "shall be set by the state personnel board." § 282.051(2)(a)3., F. S. [§ 282.051 repealed by ch. 69-106.]

The contingency fund of the general office of the governor—under whose administrative authority and at whose general direction the lieutenant governor serves, pursuant to § 2, Art. IV, State Const.—is provided for in § 282.01(1), Item 607, F. S. The state planning and budget commission is authorized by § 282.01(2), F. S. to allocate moneys as provided in said section to supplement the appropriations made from the general revenue fund to the named agencies in § 282.01(1), F. S. In fine, emergency or deficiency appropriations are available for the purpose of funding the office of lieutenant governor and may be allocated to that purpose by the state planning and budget commission.

069-2—January 24, 1969

PUBLIC OFFICERS

CONSTRUCTION OF § 5(a), ART. II, 1968 STATE CONST.—  
STATE, COUNTY AND MUNICIPAL OFFICERS

To: Bill Gunter, State Senator, Orlando

QUESTION:

Who are state, county and municipal officers within the purview and intention of the last sentence of § 5(a), Art. II, of the 1968 State Const.?

The last sentence of said § 5(a), Art. II, of the 1968 State Const., provides that, with certain exceptions, "[n]o person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein . . . ."

I find nowhere in the 1968 State Const. any constitutional definition of the term "officer" as used therein. In *State v. Sheats*, 78 Fla. 583, 83 So. 508, text 509, the Sup. Ct. of Fla. held that:

The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an employment does not comprehend a delegation of any part of the sovereign authority. The term "office" embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office, and between an employee and an officer. . . . Some offices are merely clerical or ministerial; but they are useful in enforcing the powers conferred on other officers or tribunals, and they are usually designated as offices by the law and have features of tenure and duration and of duties prescribed by law, which differentiate an office from a mere employment.

To the same effect see also *State v. Hocker*, 39 Fla. 477, 22 So. 721, text 722; *Advisory Opinion*, 49 Fla. 269, 39 So. 63, text 64; *State v. Jones*, 79 Fla. 56, 84 So. 84, text 85; *Dade County v. State*, 95 Fla. 465, 116 So. 72, text 76; *McSween v. State Livestock Sanitary Board*, 97 Fla. 749, 122 So. 239, text 246 and 247; *Amos v. Mathews*, 99 Fla. 1, 126 So. 308, text 335; *Opinion of Justices*, 120 Fla. 729, 163 So. 76, text 77; *State v. Martens*, 141 Fla. 66, 193 So. 835, text 837; *Palmer v. State*, 149 Fla. 616, 6 So.2d 550, text 552; *State v. City of Miami*, 153 Fla. 90, 13 So.2d 707, text 708; *Glendinning v. Curry*, 153 Fla. 398, 14 So.2d 794, text 798 and 799; *Advisory Opinion*, 153 Fla. 650, 15 So.2d 765, text 766; *Curry v. Hammond*, 154 Fla. 63, 16 So.2d 523; *Pace v. King*, Fla. 38 So.2d 823, text 826; *Advisory Opinion*, Fla. 63 So.2d 321, text 325; *Blackburn v. Brorein*, Fla., 70 So.2d 293, text 296 and 297.

In *Curry v. Hammond*, *supra*, it was stated: "It can hardly be questioned that a patrolman on a city police force is clothed with sovereign power of the city while discharging his duty. . . . It is the character of the duty performed that must determine his status." In *State v. Martens*, *supra*, the Court remarked: "The right, particularly, to arrest without warrant, indicates the type of power delegated to officers in

question and definitely places them in the category of 'officers' rather than employees for no right is more sacred and more jealously guarded than the one that liberty shall not be infringed except by due process of law."

Curry v. Hammond concerned a patrolman of the City of Miami, and State v. Martens involved juvenile court probation officers for the juvenile court of Dade County. In Opinion of Justices, 121 Fla. 157, 163 So. 410, text 411, the Court recognized the existence of municipal officers when it said that "[a] municipal officer is neither a state officer nor a county officer, although he may be either in addition to being a state officer . . ." if existing constitutional and statutory provisions do not prohibit the same.

Municipal officers are defined in 27A Words and Phrases, Perm. Ed. 546-551, as persons who hold municipal office, including chiefs of police, city attorneys, city engineers, commissioners, mayors, councilmen, sealers of weights and measures, police magistrates, policemen, tax collectors, treasurers, etc., when such officers are vested with official powers and duties for and in behalf of the municipality in question. That is when the applicable statutes and laws vest in the persons and officers named tenure, duration, and official duties in connection with the carrying on of the powers and duties of the municipality. The same distinctions, drawn by the courts between state officers and county officers, and state and county employees, are generally applicable to municipal officers and municipal employees.

Said § 5(a), Art. II, of the 1968 State Const. makes no distinction between legally appointed and legally elected officers; neither did the State Const. of 1885, although municipal officers included in said 1968 State Const. were not included in the 1885 State Const.

I anticipate that one of the difficulties in the enforcement of said § 5(a), Art. II, of the 1968 State Const. will be the distinction between officers and employees in many of the cases, the line of demarcation not being clear in every instance. Section 37, Ch. 14591, Laws of Florida, 1929, provides in part that, "The City Commission shall *appoint* a City Attorney" (Emphasis supplied.); other statutes might use the word "employ" a city attorney. The term "appoint" would seem to indicate the selection of an officer, while the word "employ" would seem to indicate the employment of an employee. However, I feel that this would not be conclusive, and that the entire statute or law would have to be resorted to and construed.

State, county, and municipal officers within the purview and intention of the last sentence of § 5(a), Art. II, of the 1968 State Const., are those persons who are invested by law with official duties and powers, and would not include those persons who are mere employees and who are not invested with official powers and duties in their own right, although they may exercise such powers and duties as the agent of an officer.

069-3—January 24, 1969

#### PUBLIC OFFICERS AND EMPLOYEES

##### CONSTRUCTION OF § 5(a), ART. II, 1968 STATE CONST.— DISTINCTION BETWEEN "OFFICER" AND "EMPLOYEE"

To: George C. Dayton, First Federal Bldg., Dade City

#### QUESTION:

May the same person serve as attorney for Dade City and attorney for the Pasco County School Board, in the light of § 5(a), Art. II, of the 1968 State Const.?

This office, by its Opinion 069-2, of Jan. 24, 1969, held that the state, county, and municipal officers within the intention and purview of § 5(a), Art. II, of the State Const. are those persons who are invested by law with official duties and powers, and do not include those persons who are mere employees who are not invested with official powers and duties in their own right, although they may exercise such powers and duties as the agent of an officer. This brings us to the question of whether or not the attorney for Dade City, and the attorney for the Pasco County School Board are either, or both, public officers.

Under Section 4 of Ch. 14591, Laws of Florida, 1929, amended by Ch. 65-1422, Laws of Florida, "The government and municipal authority of Dade City shall be vested in a city commission, a municipal judge, a clerk, a tax assessor, a tax collector, a chief of police, and such other officers and boards as may be in this act provided for, and such other officers and boards as the city commission may, from time to time, by ordinance, create. . . . All officers, before entering upon the duties of their respective offices, shall take and subscribe the oath prescribed by law. . . ."

Section 37 of Ch. 14591, Laws of Florida, 1929, requires that:

The City Commission shall *appoint* a City Attorney, whose duties shall be to advise the City Commission and other officers of the City on any legal question touching the discharge of his or their official duty; to draw all ordinances and resolutions for the City Commission; to represent the City in any litigation it may have; to collect delinquent taxes and foreclose liens therefor upon real estate; and to do and perform such other duties as may be required of him by ordinance or by request of the City Commission. His compensation shall be fixed by the City Commission at the time of his appointment. (Emphasis supplied.)

. . . The term "office" embraces the idea of tenure, duration and duties in exercising some portion of the sovereign power, conferred or defined by law and *not by contract*. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office, and between an employee and an officer. . . . (Emphasis supplied.) (State v. Sheats, 78 Fla. 583, 83 So. 508, text 509).

The powers and duties of the city attorney for Dade City, are largely set out in Ch. 14591, Laws of Florida, 1929, amendments and extensions thereof, and especially sections 21, 22, 23, 24, 25 and 29, of said chapter. Presuming that it has been the custom of the city attorney to take an oath of office, it appears that the city attorney of Dade City, is an officer and not an employee of said city. I find no statute or session law creating and establishing the office of attorney for the Pasco County School Board. I must, therefore, presume that the relationship is that of an employment and not an office. Employments are not within the purview and intention of said § 5(a), Art. II, of the 1968 State Const. Unless the person serving as attorney for Dade City holds some office other than attorney for Dade City, holding the position of attorney for the Pasco County School Board would not be a violation of § 5(a), Art. II, of the 1968 State Const. even if the position of attorney for Dade City is an office and not an employment.



069-4—January 27, 1969

WORKMEN'S COMPENSATION INSURANCE

ELECTED COUNTY OFFICIALS, COVERAGE—IMMUNITY FROM  
LIABILITY OF COUNTY FOR INJURIES SUSTAINED  
BY SUCH OFFICIALS

To: *Earl Rich, Clerk of the Circuit Court, Sebring*

QUESTIONS:

1. May an elected county official come under the provisions of the county policy of workmen's compensation insurance by paying the respective premium from the personal fund of the elected officer and thereby be expressly included under the coverage of the county compensation policy?

2. If an elected county official is injured while engaged in the pursuance of official county business, is the county responsible for the injuries sustained? If your answer is in the affirmative, could payment thereof be paid from county funds upon the rendition of the service by the doctor, hospital, etc.?

Chapter 440, F. S., is the Florida Workmen's Compensation Law, and governs the application and administration of the statute. Section 440.02, F. S., provides several definitions of the word "employment" as used in the Florida Workmen's Compensation Law, and Laws of Florida, none of which definitions seem to relate to public officers, such as the clerks of the circuit courts of Florida. Section 440.02 specifically provides that the term "employment" shall not include services performed by or as officers elected at the polls.

Except for § 440.04(3), F. S., question 1 would require an unconditional negative answer. This subsection provides as follows:

When any policy or contract of insurance specifically secures the benefits of this chapter to any person not included in the definition of "employee" or whose services are not included in the definition of "employment" or who is otherwise excluded or exempted from the operation of this chapter, the acceptance of such policy or contract of insurance by the insured and the writing of same by the carrier shall constitute a waiver of such exclusion or exemption and an acceptance of the provisions of this chapter with respect to such person, notwithstanding the provision of § 440.05 with respect to notice.

This subsection is not an authorization for the inclusion of an officer elected at the polls as being within Ch. 440, F. S., and should not be construed as authorizing any such inclusion. The subsection operates by way of estoppel against the insurance carrier's contending that an officer is not within an insurance contract or policy which specifically secures the benefits of the program to "an officer elected at the polls." There would seem to be no obligation on such an insurer to include such an officer elected at the polls in any subsequent insurance policy. Such an officer elected at the polls is not brought into the Workmen's Compensation Law by the inclusion of him in the insurance contract. However, the insurer may not deny such an inclusion in its insurance contract during the life of the contract. Question 1 is answered in the negative; however, when such coverage is included in such an insurance policy the insurer may not deny liability during the life of the contract.

Counties in Florida, as such, are governmental agencies through which many of the functions and powers of the state are exercised and partake of

the immunity of the state from liability for tort. Such counties may not be sued in actions ex delicto by private interests resulting from governmental operations. 8 Fla. Jur. *Counties* § 100. The county would not be liable for injuries sustained by an elected public official under the circumstances mentioned in question 2. Question 2 is answered in the negative, under existing statutes and laws.

The Florida Legislature, under § 13, Art. X, of the 1968 State Const., may by general legislation make provision for suits against the counties, including actions sounding in tort.

Thought might be given to amending § 112.08, F. S., which relates to group life, health, accident and hospitalization insurance for public employees so as to include elective and nonelective public officers.

069-5—January 27, 1969

### PUBLIC OFFICERS AND EMPLOYEES

#### CONSTRUCTION OF § 5(a), ART. II, 1968 STATE CONST.— ASSISTANT PUBLIC DEFENDER PUBLIC EMPLOYEE NOT OFFICER

To: *Philip S. Shailer, Public Defender, Fort Lauderdale*

#### QUESTION:

Does § 5(a), Art. II, of the 1968 State Const. prohibit a member of the Florida House of Representatives from being employed at the same time by the state in the capacity of assistant public defender?

Section 5(a), Art. II, of the 1968 State Const., insofar as here material, provides:

... No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, constitutional convention, or statutory body having only advisory powers.

A similar provision in § 15, Art. XVI, of the old State Const., provided:

... [n]o person shall hold, or perform the functions of, more than one office under the government of this State at the same time; Provided, Notaries Public, militia officers, county school officers and Commissioners of Deeds may be elected or appointed to fill any legislative, executive or judicial office.

The decisions of the Supreme Court of Florida, construing said § 15, Art. XVI, of the State Const. of 1885, as amended, in effect held that said section related to dual holding of state and county offices. (See annotations to said § 15, Art. XVI, of the Const. of 1885, as amended, in the Florida Statutes Annotated by the West Publishing Company, and the Annotations to Official Florida Statutes, by the Bancroft-Whitney Company and The Lawyers' Cooperative Publishing Company.) The 1968 State Const. extends the prohibition in said § 15, Art. XVI, of the Const. of 1885, which related to state and county officers only, but did not extend to municipal officers. A member of the Florida House of Representatives holds an office and not an employment. Advisory Opinion, 74 Fla. 417, 79 So. 874, where the court held that a member of



the legislature who accepted and was sworn in as a county solicitor vacated his office as a member of the legislature.

However, in *State v. Futch*, 122 Fla. 837, 165 So. 907, the Supreme Court held that T. G. Futch could hold the office of state senator and be attorney for the State Racing Commission. In the first case the court held that a member of the Florida Legislature and the office of county solicitor were both state or county offices, and neither an employment as distinguished from a public officer. In the second case the court held that the attorney for the racing commission was a state employee and not an officer, so that there was no holding of two offices as in the first case.

As to the question of whether assistant public defenders are public officers or public employees. Sections 27.50-27.59, F. S., provide "... The public defender shall be elected at the general election by the qualified electors of their respective judicial circuits as other state officials are elected and shall serve for a term of four years." Vacancies in the office of public defender are filled by the governor until the general election. It appears from said §§ 27.50-27.59, that public defenders have the status of public officers and not employees. Section 27.53, F. S., provides in part that:

The public defender may also hire assistant public defenders, investigators, secretaries, and other clerical help as funds available may permit and as otherwise provided by law. The state and each county may expend moneys in furtherance of the provisions of this act for additional salary of the public defender and assistant public defenders, and for the salaries and expenses of additional assistant public defenders, investigators, secretaries, and other clerical help, and for other necessary expenses of operation and maintenance of the office. (Emphasis supplied.)

Sections 29.01-29.10, F. S., make provision for official court reporters, who have been designated by the Supreme Court of Florida as officially employed court functionaries. *In re Opinion of the Justices*, 163 So. 76. (See also, to the same effect, *Glendinning v. Curry*, Fla., 14 So.2d 794, text 799.) I am of the opinion that, under current §§ 27.50-27.59, F. S., assistant public defenders, employed by the state by and through public defenders, are officially employed court functionaries in the nature of state employees, whether paid from state or county funds, performing state and county functions. Your question is answered in the negative so long as there is no material change in the language of §§ 27.50-27.59, F. S. However, any applicable provisions in Chs. 110 and 282, F. S., should be complied with by both the employer and employee.

069-6—February 18, 1969

#### ARRESTS

##### AUTHORITY OF MUNICIPAL POLICE OFFICER TO ARREST FOR VIOLATION OF SHOPLIFTING STATUTE, § 811.021, F. S., BASED ON STATEMENT OF EMPLOYEES OF WHOLESALE OR RETAIL ESTABLISHMENT

To: Nicholas J. DeTardo, City Prosecutor, Hollywood

#### QUESTION:

Does a municipal police officer have the right to arrest a shoplifter upon the basis of statements of clerks, employees and managers of food stores and general merchandise stores who witnessed the shoplifter committing the offense?

Section 811.022(2), F.S., provides that "[a]ny peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments." A municipal police officer is a peace officer within the contemplation of said statute. In most instances a peace officer can arrest for a felony upon probable cause or reasonable grounds for belief that the arrested person has committed a felony, but cannot make such an arrest for a misdemeanor upon such a basis. However, the above-quoted statutory provision authorizes an arrest upon probable cause for larceny committed in retail or wholesale establishments without regard to whether it is grand larceny and hence a felony or petit larceny and hence a misdemeanor. Therefore, even if such a larceny is merely a misdemeanor, an arrest therefor may be made upon the same probable cause for which an arrest may be made for a felony.

In 5 Am. Jur. 2d, *Arrest*, § 46, it is said with respect to the kind of information that constitutes probable cause for an arrest:

Statutes sometimes authorize peace officers, and even private persons, to make felony arrests without warrant on information supplied by others. It seems that, in the absence of statute, probable cause for such an arrest may be supplied by evidence that would not be competent at the trial, including hearsay. And although there is some authority to the effect that an officer must have personal knowledge of facts showing probable cause, *the usual view is that probable cause may rest on reasonably trustworthy information*, as well as on personal knowledge. Thus, a felony arrest may be made on oral complaint of the victim, although this may not be done when the charge is merely trespass. . . . *Some courts have been reluctant to uphold arrests based on information alone. But the United States Supreme Court has done so where there were adequate reasons for regarding the information as reliable.* (Emphasis supplied.)

On the same point, 6 C.J.S. *Arrest*, § 6d(2)(a) says:

*The officer, however, need not necessarily have personal knowledge of the facts constituting the offense, in the sense of having seen or witnessed the offense himself, but he may, where there are no circumstances known to him which materially impeach his information, acquire his knowledge from information imparted to him by reliable and credible third persons, or by information together with other suspicious circumstances. It is not every idle and unreasonable charge, however, which will justify an arrest, and where the officer makes an arrest without a warrant on information which he has received from a third person, the information must be such as would have induced an ordinarily reasonable man, under the circumstances, to act likewise. The information must come from a reliable source, and in this connection it has been held that an officer must know his informant, since mere anonymous information is not sufficient to act on . . .* (Emphasis supplied.)

In *Walker v. State*, 196 So.2d 8, the Dist. Ct. of App. for the 3d Dist. of Fla. quoted from the opinion of the U. S. Sup. Ct. in *Brinegar v. United States*, 93 L. Ed. 1879, as follows: "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." The

court quoted to the same effect from the opinion of the Dist. Ct. of App. for the 2d Dist. of Calif. in *People v. Lewis*, 49 Cal. Repr. 579: "But experienced stool pigeons are not the only sources of credible information, and the tests of reliability which must be applied to such persons are not necessarily applicable to every citizen who assists the police." "

The Florida court then continued,

Clearly a person who voluntarily calls the police with information concerning a violation of the law; who identifies himself and waits for the police to arrive; who cooperates in the apprehension of the suspect, and who testifies at the trial, cannot be characterized as an unknown, unreliable informant. He is, in our opinion, a citizen who has observed criminal activity and who is acting in the best interests of society.

Under these authorities, it appears that a municipal police officer who has not witnessed the offense may arrest a person for larceny committed in a retail or wholesale establishment when facts are related to such officer by a clerk, employee or manager of such establishment which, if true, show that the arrested person has committed such larceny, provided that under all of the circumstances known to the officer an ordinarily reasonable man would conclude that his informant is reliable and credible. Please note that the arrest authorized by said statutory provision and dealt with in this opinion is for a violation of the state larceny statute, § 811.021, F. S., and not for the violation of a municipal ordinance relating to larceny.

069-7—February 20, 1969

#### TAXATION

##### LIMITATION ON MUNICIPAL MILLAGE—CONSTRUCTION OF § 167.444[§ 200.131], F. S., § 9(b), ART. VII AND §§ 2 AND 6, ART. XII, 1968 STATE CONST.

To: Jack J. Rafter, Jr., City Attorney, Clewiston

#### QUESTION:

Is a Florida municipality still governed by the time table set forth in § 167.444[§ 200.131], F. S., 1967, in reducing its ad valorem millage to 10 mills in light of § 9(b), Art. VII and § 2, Art. XII, of the 1968 State Constitution?

Your question is answered in the affirmative. Section 9(b), Art. VII of the 1968 State Const. provides in part:

Ad valorem taxes, exclusive of taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation, shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: . . . for all municipal purposes, ten mills . . . (Emphasis supplied.)

Section 2, Art. XII, of the 1968 State Const. provides: "Tax millages authorized in counties, municipalities and special districts, on the date this revision becomes effective, may be continued until reduced by law." (Emphasis supplied.) My decision, then, must turn on the construction

which should be placed on the language "until reduced by law."

Section 6(a), Art. XII of the 1968 State Const. provides: "All laws in effect upon the adoption of this revision, to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed." (Emphasis supplied.) Chapter 67-396, Laws of Florida, was in effect upon the adoption of the revision. It had become effective Jan. 1, 1968. The constitution specifically provides that such laws shall remain in force until they expire by their terms or are repealed. Chapter 67-396, Laws of Florida, has not expired and has not been repealed. Thus the pivotal question is: Is § 2, Art. XII of the 1968 State Const. inconsistent with § 167.444[§ 200.131], F. S.?

If inconsistency does exist, then the provisions of the constitution would prevail and the provisions in the law would have to be found to be unconstitutional since no irreconcilable conflict with the constitution can exist. A statute or ordinance is said to be "unconstitutional" when it is in violation of some provision of the state or federal constitution or has not been enacted in accordance with the procedures laid down in the constitution for its enactment. The fundamental object in construing a constitutional provision is to ascertain and give effect to the intentions of the framers and adopters, and constitutional provisions must be interpreted in such a manner as to fulfill this intention rather than to defeat it. *State ex rel. West v. Gray*, 1954, Fla., 74 So.2d 114.

In construing particular constitutional provisions, the object sought to be accomplished and the evils sought to be remedied should be kept in mind by the courts, and the provisions should be so interpreted as to accomplish, rather than to defeat, such objects. *Owens v. Fosdick*, 1943, 153 Fla. 17, 13 So.2d 700, *State ex rel. West v. Gray*, Fla. 1954, 74 So.2d 114.

The constitution should be considered as an entirety, and all of the provisions of a constitution should be interpreted with reference to each other unless a different intent is clearly manifested. *Amos v. Mosley*, 1917, 74 Fla. 555, 77 So. 619, LRA 1918 C 482, *Scarborough v. Webb's Cut Rate Drug Co.*, 1942, 150 Fla. 754, 8 So.2d 913.

Effect should be given to every part and every word of a constitution unless there is some clear reason to the contrary. Hence, a construction of the constitution that renders any provision superlative or meaningless, or which nullifies a specific clause therein, should not be adopted unless absolutely required by the context. *State ex rel. McKay v. Keller*, 1939, 140 Fla. 346, 191 So. 542. In 16 Am. Jur. 2d *Const. Law*, § 47, pp. 218 and 219 it is stated:

Whenever a state makes changes in its fundamental law or adopts a new constitution, there is no break in the continuity of the government, and in theory the new constitution is an amendment of the one formerly existing, since a new constitution does not create a new state. Accordingly, the principle is recognized that there is a presumption that the people, in adopting a constitution, are familiar with the previous and existing laws. When a new constitution is established, it is customary to insert a provision that all statutes in force and not inconsistent with the new constitution shall continue until amended or repealed by the legislature, although it is generally recognized that such laws remain in force without an express provision to that effect. (Emphasis supplied.)

In 16 C.J.S. pp. 134, 136 and 139 respectively, it is stated:

While a new constitution is, by its very nature, intended to supersede a prior constitution, as discussed *supra* § 42, it is not



intended to supersede the entire body of statutory law. To the extent that existing statutes are not expressly or impliedly repealed by the constitution, or by constitutional amendments, *they remain in full force and effect.* (Emphasis supplied.)

It is a generally accepted rule, however, that repeals by implication are not favored; in fact there is a *presumption against such a repeal*. A constitutional provision does not repeal a statute on the ground of repugnance or inconsistency *unless they are clearly repugnant and so inconsistent that they cannot have concurrent operation*, and, in order to effect a repeal by revision, a constitutional provision must be a revision of the *entire subject matter* so that the intention that the provision will be a substitute for the prior statute is *apparent*. (Emphasis supplied.)

A constitutional provision to the effect that all existing laws not repugnant to the constitution are continued in force until they expire by their own limitation, or are altered, or repealed by the legislature has the effect of continuing in force statutes not in conflict with the constitution.

Chapter 67-396, Laws of Florida, and more particularly, Section 4, now § 167.444[§ 200.131], F. S., is presumed to be valid unless clearly and wholly irreconcilable with the new constitution. It has the presumption of validity. The 1968 State Const. clearly indicates in § 6, Art. XII, a legislative intent that all such laws are to remain in force until they expire by their terms or are repealed, when such an interpretation is possible.

I feel that the phrase "until reduced by law" includes both laws presently in existence and laws yet to be enacted. This conclusion is in accord with the intent of the framers and adopters as expressed in § 6(a), Art. XII, of the 1968 State Const. Thus, it gives effect to the intention of the framers and adopters and interprets the phrase "until reduced by law" in such a manner as to fulfill the expressed intent of preserving all existing laws wherever possible. Contrarily, if we construed this phrase as only referring to the future enactments we would necessarily have to conclude that Ch. 67-396, Laws of Florida, was unconstitutional in whole or in part. Such a construction rendering a statute unconstitutional should be avoided where the statute in question is not clearly, irreconcilably, and wholly repugnant to the constitution. See *Holbein v. Hall*, 189 So.2d 797.

This rationale is not without legal precedent. In the case of *Holbein v. Hall*, *supra*, the Supreme Court interpreted the word "municipal" found in § 1, Art. IX, of the State Const. of 1885, as amended, in such a manner as to render certain provisions of § 192.06[§ 196.191], F. S., constitutional.

The framers of the constitution, had they intended to refer only to future laws, as opposed to existing laws, could easily have made this intent apparent merely by adding the word "future" in front of the word "law." No such intent has been manifested by the framers. (Also see *Black's Law Dictionary* (4th ed. 1951), p. 1028, and 24A Words and Phrases, p. 5.) These recognize that by definition a law can exist as a law only after its enactment. Before its enactment it could not exist as a law. I presume that the people had knowledge of previous and existing laws. I cannot presume, therefore, that the people intended to refer to laws not yet in existence without some clear, positive manifestation of this intent. None exists.



I conclude that your question is answered in the affirmative. Section 167.444[§ 200.131], F. S., which provides in effect that municipalities whose rate of taxation exceeds 10 mills on the effective date of such act shall be authorized to continue at such greater rate of taxation until Jan. 1, 1970, without the referendum provided for in § 167.442[§ 200.101], F. S., is not inconsistent with the 1968 State Const.

069-8—February 28, 1969

#### STATE EDUCATIONAL PROGRAM

#### PHYSICAL FITNESS ACTIVITIES—PARTICIPATION AUTHORIZED NOT REQUIRED

To: *Robert B. Mautz, Chancellor, State University System, Tallahassee*

#### QUESTION:

Are the provisions of § 228.20, F. S., relative to physical fitness activities as a part of the state educational program mandatory?

Section 228.20, F. S., reads as follows:

**228.20 Physical fitness activities required as part of state educational program.—**

(1) The state board of education and the board of regents are hereby authorized and requested to require all public schools and higher educational institutions under the supervision of the said boards to provide programs and activities designed specifically to promote physical fitness as a part of the educational program and requirements of the said schools and institutions.

(2)(a) The curricula of all public schools may be expanded as rapidly as possible during 1965 and 1966 to provide a plan of health education and physical education covering all students attending the elementary, secondary and higher educational institutions.

(b) After July 1, 1966, the state board of education and the board of regents are requested to require that all students except those granted a medical exemption attending the public schools of this state and public institutions of higher learning participate in programs of vigorous physical activity that will develop physical fitness and increase the efficiency of the cardio-vascular system, and contribute to the development of physical skills. The state department of education and the board of regents are requested to provide curriculum guides indicating scope and progression in such activities provided such guides shall not include dancing. The state board of education and the board of regents regulations are requested to require that all students except those granted a medical exemption attending the public schools and institutions of higher learning of this state participate in health education and physical education for the minimum amount of time necessary in order to have a reasonable possibility of acquiring appropriate health knowledge and physical fitness.

Although the catch line which reads "Physical fitness activities required as part of state educational program" would indicate that the establishment of physical fitness activities in the state educational program is mandatory, the catch line is merely the editorial work of the compilers

of the statute and was not a part of Ch. 65-214, Laws of Florida, which was the legislative act and became § 228.20, F. S.

Chapter 65-214, Laws of Florida, contained a preamble, which, though not a part of the law as enacted, expresses the legislative intent and attests to the reason for the passage of such act as follows:

WHEREAS, physical fitness contributes to intellectual, moral and cultural fitness as well as fitness for self-government, and

WHEREAS, this state and this nation continue to require of our people sound bodies in support of sound minds, and

WHEREAS, the mere absence of disease in the human body does not by itself constitute physical fitness, and

WHEREAS, the present emphasis in most of our institutions of higher learning, the high schools, junior colleges and universities, is gradually centering around the major varsity spectator sports entered into by a few students drawing scholarships for playing such games and participating in such sports, for observation by large groups of students and the paying public, when more emphasis should be on minor and lifetime sports and athletic programs which provide opportunities for all students to participate in such sports as golf, bowling, basketball, baseball, gymnastics, tennis, swimming, track, boxing, wrestling, weight lifting and other body-building activities, and

WHEREAS, an appalling number of young men and women today graduating from Florida schools and universities are not participating in any team or group competition or wholesome physical endeavor, and records show that approximately six (6) out of every seven (7) coming up for a physical examination in the armed forces now fail because of lack of physical fitness, and

WHEREAS, the school health education program provides knowledge and understanding based on scientific facts and principles in order to develop desirable health attitudes and behavior for promotion of physical fitness, and

WHEREAS, recent surveys clearly indicate that health instruction in our schools and institutions of higher education is very inadequate, and

WHEREAS, there is no place where organized physical exercise can build stronger bodies, lending aid to longevity of life and happiness, than in our public schools and universities, where tax moneys are being used to expand the mind and body, and

WHEREAS, special efforts must be directed toward the proper development of the physical fitness of our young people . . . .

You will note from a reading of § 228.20, F. S., that nowhere did the legislature absolutely require the establishment of physical fitness programs nor did it require that participation in programs so established be made mandatory. The legislature did, however, authorize and request the establishment of such programs and authorized and requested the educational agencies to make participation in such programs mandatory for students not granted a medical exemption. I conclude, therefore, that

the provisions of § 228.20, F. S., are not mandatory, but in view of the preamble to Ch. 65-214, Laws of Florida, I observe that the legislature intended for § 228.20, F. S., to be highly persuasive and failure to comply therewith should not be arbitrary, but should be based on sound, defensible reasoning.

069-9—March 10, 1969

### CRIMINAL PROCEDURE

#### COURT APPOINTED ATTORNEY FOR REPRESENTATION OF INSOLVENT DEFENDANT IN CAPITAL CASE—AUTHORIZED PAYMENT OF COSTS FOR INVESTIGATION AND PREPARATION OF CASE FOR TRIAL

To: Joseph E. Johnston, Jr., Assistant State Attorney, Brooksville

#### QUESTION:

If an attorney is appointed to represent an insolvent defendant in a capital case under the authorization of § 909.21, F. S., is he entitled to be paid for "costs for investigation and preparation of the case for trial" when he makes no claim that he has paid or incurred any expenses for investigation and preparation of the case for trial?

Section 909.21, F. S., reads as follows:

**909.21 Appointment of counsel in capital cases; appeals from judgments imposing the death penalty.—**

(1) In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation and costs for investigation and preparation of the case for trial as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, shall, in the event of conviction and sentence of death, appeal the case to the supreme court and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable for any reason to perfect and prosecute the appeal, the court shall, relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him and apply for discharge by the court. (Emphasis supplied.)

(2) The compensation of counsel for the defendant, at the trial, shall not exceed seven hundred fifty dollars unless the court appoints two or more counsel in which case the compensation shall not exceed a total of one thousand dollars; and the compensation of defendant's counsel on appeal shall not exceed five hundred dollars additional. The cost of investigation and preparation of the case for trial shall not exceed two hundred fifty dollars.

(3) In the event of a second trial of the same cause, the attorney appointed to represent the indigent defendant shall be entitled to additional compensation in an amount not to exceed one half of the attorney's fee awarded for the defense of the first trial.

Note that the statute provides for allowances for compensation and costs for investigation and preparation of the case for trial and sets limits upon the amounts to be allowed for these items. The allowance for "compensation" is to pay the appointed attorney for his services, including those services performed in investigating and preparing the case for trial. The allowance for "costs for investigation and preparation of the case for trial" is to cover the sums of money reasonably expended or contracted for by the appointed attorney in investigating and preparing the case, such as for long distance calls, travel, obtaining needed certified or uncertified copies, etc. The purpose of this allowance is to prevent the attorney from having to suffer financial loss on account of expenditures reasonably made or incurred in investigating and preparing the case; it does not cover the ordinary expenses of the attorney in conducting his law practice; nor should such an allowance be made for the purpose of compensating the attorney for his services or any part thereof, the allowance for "compensation" being for that purpose. Therefore, your question is answered in the negative.

069-10—March 11, 1969

#### COUNTY FUNDS

#### CONSTRUCTION OF § 1(b), ART. VIII, 1968 STATE CONST., IN CONNECTION WITH SPECIAL LAWS AUTHORIZING THE EXPENDITURE OF COUNTY MONEY FOR SPECIFIED PURPOSES

To: Ralph B. Wilson, County Attorney, Fort Pierce

#### QUESTION:

Are special acts such as Chs. 59-1797, 59-1802, 59-1804, and 63-1869, Laws of Florida, inconsistent with § 1(b) of Art. VIII of the 1968 State Constitution?

Section 1(b), Art. VIII 1968 State Const., provides: "(b) COUNTY FUNDS. The care, custody and method of disbursing county funds shall be provided by general law." (Emphasis supplied.) Section 6(a), Art. XII, 1968 State Const., preserves statutory law only "to the extent not inconsistent" with the revised constitution.

The special acts in question relate generally to county authority to perform or contract for performance of certain functions declared to be county functions or purposes, such as provisions for indigents, libraries, and promotional activities. The provisions of the special acts authorizing the expenditure of county funds for these purposes are necessarily incidental to the primary purpose of the law, and do not relate either to a "method of disbursing" or to the care and custody of such funds in the sense that those terms have been defined in legal use: "Custody. The care and keeping of anything . . . possession . . . implying responsibility for the protection and preservation," as opposed to "the final, absolute control of ownership." Black's Law Dictionary, Revised, Fourth Edition.

The constitutional terms apparently refer to the manner and method by which county funds shall be kept and disbursed. The requirement is that regulation of those aspects of county operations shall be by general law rather than special acts, in conformity with past constitutional inhibitions such as those against special acts regulating the practice and procedure in courts, construed to be intended to provide uniformity in methods of litigation. *Cates v. Heffernan*, Fla. 1944, 18 So.2d 11. By further analogy, the former constitutional prohibition against special acts regulating the duties of county officers did not prohibit authorization by



special act for purchase of land for a courthouse site. *Davis v. Tyler*, 95 Fla. 811, 116 So. 760. Further problems may be presented by those provisions of the cited acts which authorize accomplishment of their purposes by grant of funds to nonprofit corporations, and which condition authorization on prescribed audit procedures. A summary consideration, however, does not indicate any fatal constitutional impact. Your question is answered in the negative.

069-11—March 13, 1969

#### STATE MILITIA

#### INAPPLICABILITY OF § 6, ART. IV, 1968 STATE CONST., PROVIDING FOR REORGANIZATION OF EXECUTIVE DEPARTMENT

To: *Ralph B. Wilson, County Attorney, Fort Pierce*

#### QUESTION:

Is the national guard and the militia subject to reorganization as provided by § 6, Art. IV, 1968 State Constitution?

Section 6, Art. IV, reads in pertinent part:

SECTION 6. Executive departments.—All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. . . .

The militia, including the national guard, the office of adjutant general and chief of staff, falls within the exception. Section 2, Art. X, of the 1968 State Const., provides for the militia. By an opinion in 1917, the Supreme Court advised then Governor Catts of the details of the constitutional definition of the militia and indicated that the militia under the 1885 Constitution included all able-bodied males between the ages of eighteen and forty-five "no matter by what other name such organized body or bodies of men may be designated." Advisory, 74 Fla. 92, 77 So. 87. I refer to that case because I believe that the national guard is definitely a part or portion of the militia of the state. Also, by § 2(c) of Art. X, 1968 State Const., it is provided that the governor should appoint the commissioned officers of the militia, including an adjutant general who shall be chief of staff. When I examine the authority of the governor as prescribed by § 1(a), Art. IV, 1968 State Const., I find that the governor "... shall be commander-in-chief of all military forces of the state not in active service of the United States. . . ." Further, in subsection (d) thereof, it is provided that: "The governor shall have power to call out the militia to preserve the public peace, execute the laws of the state, suppress insurrection, or repel invasion."

Based on these constitutional provisions, it is my opinion that the framers of the constitution made provision for the national guard and the militia by these quoted and mentioned provisions of the constitution and, consequently, it is not contemplated that the national guard and the militia, or the adjutant general and chief of staff, should be one of those branches of the executive function to be allotted among the twenty-five mandated departments.

069-12—March 13, 1969

### SOVEREIGN IMMUNITY

#### DISTRICT SCHOOL BOARD AS AGENCY OF THE STATE— GARNISHMENT PROCEEDINGS

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

#### QUESTIONS:

1. Is the school district an agent of the state?
2. Is a school district clothed with immunity from the garnishment proceedings provided for by Ch. 77, F. S.?

Your questions are answered in the affirmative. As long ago as 1937 my predecessor in office ruled that under the common law and the decisional law the state, by virtue of its sovereignty, is not subject to be served with a writ of garnishment. See the 1937-1938 Biennial Report of the Attorney General, p. 464. The county is not subject to a garnishment proceeding in the absence of express statutory authority. *Duval County v. Charleston Lumber and Mfg. Co.*, 33 So. 531, Fla. 1903. Garnishment is invalid as against a municipality. *Ake v. Chancey*, 13 So.2d 6, Fla. 1943.

County school boards are part of the machinery of government operating at the local level as an agency of the state in the performance of public functions. County boards, being agencies of the state, are clothed with the same degree of immunity from suit as the state. *Buck and Buck v. McLean, et al.*, 115 So.2d 764, Fla. App. 1959. The doctrine of sovereign immunity permits suits against the state only when specifically provided by general law. A change in the rule must come either by constitutional amendment or enactment of appropriate legislation, or both. *Buck and Buck v. McLean, et al.*, *supra*.

Although § 77.01, F. S., provides that writs of garnishment are available against any person, natural or corporate, and § 230.21, F. S., declares that a county board is a body corporate, the Florida court held in *Duval County v. Charleston Lumber and Mfg. Co.*, *supra*, that statutes authorizing garnishment proceedings against corporations apply to private but not to public corporations and that garnishment, being a purely statutory proceeding, cannot be pushed in its operation beyond the statutory authority.

To maintain a suit in derogation of state sovereignty, a constitutionally authorized statute must first appear. The authorities are unanimous in requiring strict construction of statutes conferring the right to maintain suits against a state. *Kennard v. State Tuberculosis Board of Florida*, 176 So. 872, Fla. 1937. In view of the above authorities, it is my opinion that a school district is clothed with the same immunities as the county government, or those of the state, in regard to writs of garnishment.

The only exception to the rule of immunity of public bodies from garnishment proceedings is contained in § 61.12, F. S., which authorizes the garnishment of the salary of a public officer, state or county, to enforce the orders of the courts of this state for alimony, suit money or support, or other orders in actions for divorce or alimony.

069-13—March 14, 1969

### TAXATION

#### DOCUMENTARY STAMP TAXES, INTANGIBLE PERSONAL PROPERTY TAX—EXEMPTION, STATE BANKS

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

#### QUESTIONS:

1. Are state banks now exempt from documentary stamp taxes on notes, mortgages, or other evidences of debt held by state banks, and on shares of stock and capital debentures issued by state banks?

2. Are state banks now exempt from intangible personal property taxes on mortgages owned and recorded by state banks?

Questions 1 and 2 are answered in the affirmative. Section 192.54[§ 196.27], F. S., reads as follows:

Banks and trust companies; exemption from taxation, etc.—All banks, trust companies and Morris plan banks, now or hereafter chartered under the laws of the state, shall have the same immunity from state and local taxation that national banking associations have from time to time under the statutes of the United States.

When the U. S. Congress or the U. S. Supreme Court under U. S. Statutes carves out an immunity from state and local taxes for "national banks," the Florida Legislature has seen fit to grant this same immunity to all state chartered "banks, trust companies and Morris plan banks."

The U. S. Supreme Court has affirmed an order of the U. S. Dist. Ct. for the Northern Dist. of Fla. in the case of *Dickinson, Comptroller v. First National Bank of Homestead, et al.* No. 741. The petition for rehearing was denied by the Sup. Ct. on Mar. 3, 1969. The pertinent provision of the affirmed order reads as follows:

... [T]he defendants jointly and severally are restrained and enjoined from levying, assessing or collecting ... (b) intangible personal property taxes on mortgages owned and recorded by plaintiffs, (c) documentary stamp taxes on notes, mortgages or other evidences of debt held by plaintiffs, and on shares of stock and capital debentures issued by plaintiffs.

This order, in essence, set out that national banks, as federal instrumentalities, have been immune from the above-listed taxes as they are not within the purview of 12 U.S.C.A., § 548. By virtue of § 192.54[§ 196.27], F. S., State of Florida chartered "banks, trust companies and Morris plan banks" enjoy this same immunity.

069-14—March 18, 1969

### CITIES AND TOWNS

#### LIMITATIONS ON ISSUANCE OF MUNICIPAL REVENUE BONDS OR CERTIFICATES ISSUED SUBSEQUENT TO THE EFFECTIVE DATE OF THE 1968 STATE CONST.

To: William A. Norris, Jr., City Attorney, Bartow

#### QUESTION:

May the City of Bartow, after Jan. 7, 1969, issue revenue bonds or certificates in accordance with the various provisions of its charter or is the municipality limited by § 10, Art. VII, 1968 State Const., to revenue bonds for airport and port facilities or for industrial and manufacturing plants?

Section 2(b), Art. VIII, of the 1968 State Const. states that municipalities "shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. . . ." Section 6(b), Art. VIII, 1968 State Const. continues in effect the status of municipal powers formerly provided by law: "The status of the following items . . . shall be continued until changed in accordance with law: . . . the municipalities and special districts of the state, their powers, jurisdiction and government."

The inquiry here concerns the effect of § 10, Art. VII, 1968 State Const., which makes an exception from its prohibition against the use of public credit by state and local governments to aid private interests.

. . . [S]hall not prohibit laws authorizing: . . . the issuance . . . by any . . . municipality . . . of (1) *revenue bonds to finance or refinance the cost of capital projects for airports or port facilities*, or (2) . . . *industrial or manufacturing plants* to the extent that the interest thereon is exempt from income taxes under the then existing laws . . . (Emphasis supplied.)

This provision does not, in terms, define the purposes for which revenue bonds may be issued by municipalities and other governmental bodies. It simply specifies the circumstances in which revenue bonds may be issued without regard to the primary prohibition against use of public credit "to aid any corporation, association, partnership or person."

Under basic rules of constitutional construction, requiring that all parts of organic law be given the fullest consistent operable effect *Amos v. Mosley*, 1917, 74 Fla. 555, 77 So. 619; *State ex rel. McKay v. Keller*, 1939, 140 Fla. 346, 191 So. 542, § 10(c) of Art. VII, 1968 State Const., should not affect the exercise of municipal powers under general provisions of Art. VIII, *supra*, except when necessary to determine whether or not a revenue bond issue violates the prohibition in Art. VII against a pledge of credit. The specification of certain revenue bond issues (airports, port facilities, and exempt interest bonds for industrial plants) to be removed from the credit pledge proscription, does of course require that revenue bonds for all other purposes remain subject to § 10, Art. VII. The expression of these purposes in that connection does not, however, place any express or implied restriction on the purposes for which municipal revenue bonds may otherwise be issued under applicable law.

Section 2(b), Art. VIII, 1968 State Const., contains no specific limitation on the exercise of powers for municipal purposes except as



provided by law, and by § 6(b), Art. VIII, 1968 State Const., preserves existing applicable law. We conclude that § 10, Art. VII, of the 1968 State Const. does not limit a municipality's power to issue revenue bonds except to the extent that such issue may violate the initial paragraph of that section.

069-15—March 18, 1969

#### COMPENSATION OF PUBLIC OFFICIALS

##### LEON COUNTY PROSECUTING ATTORNEY FOR THE COUNTY JUDGE'S COURT, AUTHORIZED FEES; CH. 67-1055, LAWS OF FLORIDA, §§ 125.04 and 34.11, F. S.

To: *F. E. Steinmeyer, III, County Attorney, Tallahassee*

#### QUESTION:

Is the county prosecuting attorney of Leon County entitled to be paid a fee on account of a felony case when the defendant was charged in the county judge's court, bound over to the circuit court, and convicted in the latter court?

Chapter 67-1055, Laws of Florida, created the office of prosecuting attorney for the county judge's court of Leon County, and Section 3 thereof prescribed his duties as follows:

Section 3. That the Prosecuting Attorney for the County Judge's Court of Leon County, Florida, shall prepare and take all affidavits and/or informations in all criminal cases originating in the County Judge's Court, and he shall also prosecute all criminal cases and attend all preliminary hearings and coroner inquests had before the County Judge's Court.

As to the compensation of said prosecuting attorney, Section 5 of Ch. 67-1055, Laws of Florida, provides as follows: "Section 5. That the compensation of the Prosecuting Attorney for the County Judge's Court of Leon County, Florida, shall be as is provided by general law."

As to the question of what the general law provides in the way of compensation for said prosecuting attorney, § 36.22(1), F. S., 1967, a part of the general law of the state, provides as follows:

(1) In the counties wherein there have been established by local or special law and in those counties which, in the future, shall so establish by local or special law the office of county prosecuting attorney for the county judges' court, and such office is to be filled by election, a prosecutor so elected or appointed by the governor, shall receive as net compensation the fees provided in §§ 125.04 and 125.041 as is provided for employed prosecutors, not to exceed however, the sum of nine thousand dollars per annum.

and is applicable to the prosecuting attorney of Leon County because Ch. 67-1055, Laws of Florida, which created his office, is a local law which provides for filling the office by election. Section 36.22(1), F. S., provides that the prosecuting attorney shall receive the fees provided in §§ 125.04 and 125.041, F. S., and therefore we look to those sections along with § 125.03, F. S., which read as follows:

125.03 Commissioners required to employ prosecuting attorney.—The county commissioners of any county wherein there shall be no county court or criminal court of record or

court of record for the trial of criminal causes shall employ an attorney at law to prosecute all persons, charged with the commission of any kind of offense against the laws of the state in or before the county judge's court.

**125.04 Compensation of prosecuting attorney.**—The compensation of the attorney so employed by the county commissioners as provided by § 125.03 shall be not less than three hundred dollars or more than six hundred dollars per annum, payable monthly, and in addition thereto said attorney shall be entitled to and shall receive the same fees for conviction as are now or may hereafter be provided by law for attorneys in county courts as conviction fees in cases prosecuted before county court. Said conviction fees to be taxed as part of the cost in each case in which such conviction shall be had before the court of the county judge. Said compensation and fees shall be payable out of the fine and forfeiture fund of the county.

**125.041 Same; estreated bonds.**—The prosecuting attorney for the county judges' court shall receive ten per cent of each cash bond which is estreated in such court and ten per cent of each bail bond with a surety or sureties which is estreated in such court and collected; provided that he shall in no event receive a greater sum on account of any such bond than would be payable to him as a conviction fee if the defendant were convicted, and provided that in the event a defendant whose cash bond has been estreated is subsequently arrested, tried and convicted, such prosecuting attorney shall receive as compensation for said conviction only the amount, if any, by which the conviction fee otherwise allowed by law exceeds the amount received by or payable to him on account of such cash bond estreature.

Since §§ 125.03 and 125.041, F. S., are not relevant to a consideration of the question presented by you, they will not be considered further in this opinion.

The only fees provided for by § 125.04 are the "same fees for conviction" as are provided for attorneys in county courts. Section 34.11, F. S., provides that the prosecuting attorney for the county court shall be paid \$5 for each conviction. Therefore, the prosecuting attorney for the county judge's court of Leon County is entitled to be paid \$5 for each conviction in that court. He is not entitled to be paid a conviction fee when the defendant is convicted in the circuit court after being bound over to that court by the county judge's court. That is made crystal clear by the following provision of § 125.04, F. S.: "... Said conviction fees to be taxed as part of the cost in each case in which such conviction shall be had before the court of the county judge. ..." Said quoted provision requires that a conviction fee be taxed as part of the costs "in each case in which such conviction shall be had before the court of the county judge." This excludes any idea that said prosecuting attorney can ever be entitled to a conviction fee when the conviction occurs in the circuit court. [Said quoted provision of § 125.04, F. S., precludes the prosecuting attorney for the county judge's court of Leon County from entitlement to a conviction fee when the conviction is in the circuit court because § 36.22(1), F. S., prescribes that said prosecuting attorney shall receive the fees provided by § 125.04 for employed prosecutors and because § 125.04 does not provide a conviction fee for an employed prosecuting attorney except when such fee is taxable as costs in a case in which the conviction is had in the county judge's court.]

Chapter 67-1055, Laws of Florida, requires the prosecuting attorney for the county judge's court of Leon County to prepare and take all

affidavits in criminal cases originating in said county judge's court and requires him to attend all preliminary hearings in said court, yet no compensation is provided for these services, even though that court binds a felony defendant over to the circuit court and he is convicted in the latter court. The law concerning such situations was set forth by the Sup. Ct. of Fla. in *Gavagan v. Marshall*, 33 So.2d 862, 864, where it was said:

Concerning compensation to public officers, this Court, in the case of *Rawls et al.*, as County Commissioners, v. *State ex rel. Nolan*, 98 Fla. 103, 122 So. 222, headnote 1, has held: "Public officers have no claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided rendition of such services is deemed to be gratuitous."

\* \* \* \* \*

Also, in the much later case of *State ex rel. May*, County Judge, v. *Fussell, et al.*, 157 Fla. 55, 24 So.2d 804, 805, this Court again used the same language quoted above from the *Nolan* case, and further said: "The duties of a public officer may be exacted without specific compensation . . ."

Your question is answered in the negative.

069-16—March 18, 1969

#### STATE EMPLOYEES; RESIDENTIAL REQUIREMENTS

#### FLORIDA PROBATION AND PAROLE COMMISSION—CONSTRUCTION OF \*§ 947.08 AND 112.02, F. S.

To: *Roy Russell, Chairman, Florida Probation and Parole Commission, Tallahassee*

#### QUESTION:

Can the Florida Probation and Parole Commission administer examinations to, and hire persons with, special knowledge in penology, social welfare, or correctional supervision, as contemplated by § 947.08, F. S., even though said persons have not been Florida residents for more than two years, where the commission by due diligence has determined that no person can be found in the state possessing the qualifications necessary to the particular employment?

Your question is answered in the affirmative. I base my opinion upon the following reasoning. Section 947.08, F. S., states the probation and parole commission cannot employ staff members who have not been bona fide residents of this state for more than two years unless it has been ascertained by "... due diligence no person can be found in the state possessing the required qualifications necessary to the particular employment." This section appears to be consistent with the mandate of § 112.02, F. S. However, § 947.09(1), F. S., requires the commission to conduct competitive examinations for certain employees where the positions to be filled require "... special knowledge in penology, social welfare or correctional supervision, . . . . Only citizens of Florida who have resided in and have been bona fide residents of the state for two years or more next prior to the date thereof shall be eligible to take such examinations and for employment by the commission."

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\*Note.—Chapter 69-20, Laws of Florida, repealed § 947.08 and 112.02.

It is clear §§ 947.08 and 947.09, F. S., are in *pari materia* and consequently must, if possible, be construed so as to avoid conflict. Section 947.08, F. S., is the basic authority for the probation and parole commission to hire all its staff and not just some of it. Consequently, the exception in § 947.08 allowing the hiring of persons with less than two years' Florida residence applies to all commission staff members and not just some of them.

It would, therefore, be illogical and entirely contradictory to assume the legislature intended to overrule the hiring exception of § 947.08 by § 947.09, F. S., which relates to the most highly specialized of the commission staff and thus, precisely those persons who are hardest to find within any given geographical area and the lack of whom would be most detrimental to the proper supervision and rehabilitation of probationers and parolees. A final reason for construing these provisions in *pari materia* is that it appears they were sections of the same initial legislation, Sections 5 and 6 of Ch. 20519, Laws of Florida, 1941, as amended by Sections 1 and 2 of Ch. 21775, Laws of Florida, 1943.

069-17—March 25, 1969

#### SPECIAL AND LOCAL LEGISLATION

##### NOTICE, PUBLICATION AND JOURNAL ENTRY REQUIREMENTS— CONSTRUCTION OF §§ 10 and 11, ART. III, and § 10, ART. XII, STATE CONST.

To: Paul W. Danahy, Chairman, Local Government Committee, House of Representatives, Tallahassee

##### QUESTION:

1. Does the 1968 State Constitution, § 10, Art. XII, preserve the notice, publication and journal entry requirements for local and special bills stated in former § 21, Art. III?
2. What is the effect of the provision against "general law of local application" contained in § 11(a), Art. III, 1968 State Constitution?
3. Does § 11(b), Art. III, 1968 State Constitution, permit enactment of general laws based on a population classification?

##### AS TO QUESTION 1:

Section 10, Art. III of the 1968 State Const. provides, as to enactment of special laws without referendum, that no such law shall be passed "unless notice of intention to seek enactment thereof has been published in the manner provided by general law." (Emphasis supplied.) The new State Const., § 10, Art. XII, also states that those provisions of former Art. III, which are omitted but not inconsistent with the revision "... shall become statutes subject to modification ..." The requirements stated in former § 21, Art. III with regard to enactment of local and special laws without referendum are:

"... [N]otice shall be published in the manner provided by law at least thirty days prior to introduction... The evidence that such notice has been published shall be established in the Legislature before such bill shall be passed, and such evidence shall be filed or preserved with the bill in the office of the Secretary of State in such manner as the Legislature shall provide, and the fact that such notice was established in the Legislature shall in every case be recited upon the Journals ...."



These requirements are not inconsistent with the present provision that notice be published "in the manner provided by [general] law." The latter reference clearly contemplates both existing and future laws, in view of other language (§ § 6, 10, Art. XII, State Const.) preserving consistent existing law and retaining consistent portions of the former constitution as statutory law. The provisions of former Art. III as to manner of publication of notice should therefore have the same controlling effect as § § 11.02 and 11.04, F. S., until amended. However, § 21, Art. III, State Const., 1885, makes publication of notice "in the manner provided by law" a condition precedent to enactment of special laws. Notice is therefore mandatory under the rationale of decisions, *infra*, so holding under the former provision that "notice shall be published in the manner provided by law," although such matters as the period of publication are now entirely subject to statutory control.

The former requirements as to filing and journal entries may be retained on the same reasoning, but a broad legislative discretion exists with respect to such procedural matters which are not covered by organic law and which may be subject to amendment by rule. Advisory Opinion, 152 Fla. 547, 12 So.2d 583. 81 C.J.S. 956, States, § § 39, 41; 82 C.J.S. 36, Statutes, § 14.

#### AS TO QUESTION 2:

Section 11(a), Art. III, State Const. now provides that there shall be no special law or general law of local application pertaining to certain subjects enumerated therein. General laws of local application, under Florida decisions, include population acts and other general laws based on proper classification or on some constitutionally permissible limited application. *State v. Daniel*, Fla. 1924, 99 So. 804, 809; *Cantwell v. St. Petersburg Port Authority*, Fla. 1945, 21 So.2d 139; *County of Dade v. City of No. Miami Beach*, Fla. 1959, 109 So.2d 362.

The effect of § 11(a), Art. III, State Const. is, therefore, to require that the matters enumerated shall be governed only by general laws which are not restricted to a local application by classification or otherwise.

#### AS TO QUESTION 3:

With respect to enactment of general laws on other subjects, § 11(b), Art. III, State Const. provides that "... political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law." This section imposes no new requirement beyond that formerly applicable to general laws, including population acts.

A general law which fails to operate uniformly throughout the state is invalid unless it contains a classification predicated upon a reasonable basis. *State v. Mason*, Fla. 1964, 172 So.2d 225. See also *Yoo Kun Wha v. Kelly*, Fla. 1963, 154 So.2d 161; *Crandon v. Hazlett*, Fla. 1946, 26 So.2d 638.

Under § 11(b), Art. III, population acts on subjects not listed in § 11(a) may, as in the past, be enacted if there exists a reasonable relationship between the subject of the law and the population classification made by such law.

In sum, the conclusions above-stated are: 1. That the requirements of the former constitution as to publication of notice on special and local bills remain applicable as general law in conjunction with existing statutes until amended; 2. That population acts and other general laws of local application, as well as special acts, are prohibited on the subjects set forth in § 11(a), Art. III, State Const., 1968; and 3. That general laws, including population acts, may be enacted on other subjects if classification of governmental entities is made on a basis reasonably related to the subject of the law.

069-18—March 27, 1969

STATE AND COUNTY OFFICERS AND EMPLOYEES

RETIREMENT—CONSTRUCTION OF § 122.35, F. S., FUNDING OF  
STATE AND COUNTY RETIREMENT SYSTEM

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTION:

May the state comptroller utilize state funds to match the total cost of retirement and social security contributions after June 30, 1967, pursuant to § 122.35(4)(b)1.d., F. S.?

Section 122.35, F. S., as amended by Chs. 67-411 and 67-371, Laws of Florida, requires the budgeting and payment (to account B of the intangible tax trust fund) of matching payments for withholding contributions required for purposes of retirement and social security benefits in part as follows:

(1) Commencing July 1, 1967, for all state agencies and commencing October 1, 1967, for all other agencies... each officer or board... withholding contributions... shall budget... matching payments in....

(a) An amount equal to... member contributions paid....

(4)... The amounts received... shall be used for the following purposes....

(b)1.d. The total cost of matching the... contributions... shall be calculated by the comptroller for the 1966-67 fiscal year. In calculating the cost for any county covered under § 122.32 the comptroller shall use eight and two tenths percent of the payrolls submitted... for the 1966-67 fiscal year. Using the costs thus calculated as a base, each county whose allocations in the first year under this act is insufficient to meet said costs may reduce its contributions to the retirement fund by the amount of such deficiency during each year of the 1967-69 biennium.... The provisions of this subparagraph shall be effective *during the 1967-69 biennium* notwithstanding any conflict with *other provisions* of this chapter or any other section or provision of the Florida Statutes. Effective July 1, 1969, these special provisions shall no longer apply and each county... shall fully match... contributions made by its employees....  
(Emphasis supplied.)

All of the statutory language appears to be consistent with an intent to require matching payments for all contributions withheld after the effective date of the law and to leave unaffected the authority for utilization of state funds to match the total amount of contributions withheld through June 30, 1967. The requirement of matching payments by employers in amount of "member contributions paid" commencing July 1, 1967, imposes no obligation for matching payments for contributions withheld from salaries prior to June 30, 1967. The law does not specify that contributions shall not be deemed paid until remitted and received.

Calculation, under § 122.35(4)(b)1.d., F. S., on the basis of the fiscal year, should be construed in conjunction with related language in the same subparagraph, which requires that certain counties' cost be determined on the basis of a percentage of "payrolls submitted... for the 1966-67 fiscal year," as opposed to those submitted during the fiscal year. The final provision of said subparagraph is that it shall be "*effective during the*

1967-69 biennium notwithstanding any conflict with *other provisions of this chapter* or . . . Statutes." (Emphasis supplied.) This language does not in terms alter or conflict with the commencement dates provided in § 122.35 to be effective within the biennium: July 1, 1967, for all state agencies and October 1, 1967, for all other agencies.

Your question is therefore answered in the negative as to contributions withheld after June 30, 1967, by state agencies, and after September 30, 1967, by other agencies; and in the affirmative as to contributions from payrolls prior to those dates.

069-19—March 28, 1969

#### REAL PROPERTY

##### ALIENATION OF HOMESTEAD IN CASE OF INCOMPETENT SPOUSE—§ 745.15(6), F. S.; § 4(c), ART. X, STATE CONST.

To: Donald L. Tucker, State Representative, Tallahassee

#### QUESTION:

Does § 745.15(6), Florida Statutes, need revision which excludes homestead property from provisions for conveying, leasing, mortgaging or releasing property rights or interests of incompetents in this language: "(6) Nothing contained in this section shall be construed to apply to homesteads under § 1, Art. X, of the state constitution [1885]."?

Section 4(c), Art. X, of the 1968 State Const., now provides as to homesteads: "... If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law." It seems clear that deletion of subsection (6) from § 745.15, *supra*, would accomplish the constitutionally permissible provision for alienation of homestead property of an incompetent owner or spouse, unless the legislative power is exercised by some alternative means to distinguish between conveyance of homestead and other property.

069-20—April 2, 1969

#### STATE AND COUNTY OFFICERS

##### CONSTRUCTION OF BONDING REQUIREMENT CONTAINED IN § 5(b), ART. II, STATE CONST.

To: William H. Fleece, Vice-Chairman, Ad Valorem Taxation Committee, St. Petersburg

#### QUESTION:

Does § 5(b), Art. II, State Const., 1968 mean that only in those situations wherein the law requires a bond must the officer be so bonded?

Section 5(b), Art. II, State Const., states that "Each state and county officer, before entering upon the duties of the office, shall give bond as required by law, . . ." Under ordinary rules of construction, the provision that an act shall be done "as required by law" is in terms mandatory and contemplates obligatory legislative implementation by statute. That conclusion follows from the usual definition of "as" to mean "in the manner" rather than "if" or "to the extent." *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, 697. Words and Phrases, Vol. 4, Perm. Ed., p. 285 *et seq.*

However, a contrary result was reached in the case of *State v. Garrett*, Fla. 1937, 178 So. 309, applying a similar provision in the former State Const., § 7, Art. VIII, with reference to county officers. The opinion states "[W]e think the question of whether a county officer shall be required to give a bond . . . is one in the discretion of the Legislature to determine." That constitutional provision stated ". . . no such commission shall issue to any such officer, until he shall have filed . . . a good and sufficient bond, in such sum and under such conditions, as the Legislature shall by law prescribe . . ." Since that language is not materially distinguishable, the *Garrett* decision is, until qualified or limited, authority for an affirmative response to the question above stated. In any event, it is recognized that such legislative implementation cannot usually be coerced, and that its absence can in a practical sense operate to suspend a constitutional requirement. 16 C.J.S. pp. 177, 178, *Const. Law* § 65.

Section 6, Art. XII, State Const. 1968, preserves existing laws in this area, since such laws are not inconsistent with § 5(b), Art. II, *supra*. We find no general provision comparable to § 5(b) in the former State Const. other than that relating to county officers above noted, but legislative authority to impose bonding requirements was not expressly limited and existing statutes remain effective until amendment. Numerous decisions serve to define the terms officer and state officer, but we find none sufficiently broad to include all agency heads or directors. *State v. Hocker*, 39 Fla. 477, 22 So. 721; *State v. Sheats*, 78 Fla. 583, 83 So. 508; *Dade County v. State*, 95 Fla. 465, 116 So. 72, 76; *McSween v. State Livestock Sanitary Bd.*, 97 Fla. 749, 123 So. 239, 246; *State v. Futch*, 122 Fla. 837, 165 So. 907; *Advisory Opinion*, Fla. 1953, 63 So.2d 321; *Advisory Opinion*, Fla. 1961, 132 So.2d 1.

Said § 5(b) should, on the basis of the above reasoning, be implemented by enactment of statutory bonding provisions for all state and county officers, as opposed to employees or administrative officials, but in the absence of implementation, by existing or new legislation applicable to a particular officer, a bond will not likely be held mandatory.

069-21—April 7, 1969

#### STATE UNIVERSITY SYSTEM

##### PRIOR LEGISLATIVE APPROVAL OF CONSTRUCTION OF BUILDING FACILITIES—EXEMPTION AS PROVIDED BY § 240.141(2)(c), F. S., FOR CONSTRUCTION OF DOR- MITORIES AND AUXILIARY ACCOMMODATIONS FINANCED PURSUANT TO § 243.131, F. S.

To: *Robert B. Mautz, Chancellor, State University System, Tallahassee*

#### QUESTION:

Is prior legislative authorization required for the construction of two swimming pools at the University of Florida within student housing areas where approval for such construction project is given in revenue certificate resolution?

The revenue certificates issued to finance these facilities were issued pursuant to the authority granted under § 243.131, F. S. Section 240.141(1), F. S., provides that "No building facilities, except as hereinafter provided, shall be constructed or added to by the state university system without prior approval of the legislature." You inquire as to whether specific legislative approval will be required as a prerequisite



to the construction of the proposed pools. Section 240.141(2)(c), F. S., exempts from the requirement of legislative approval for buildings the "Construction of dormitories or other auxiliary accommodations financed as provided in § 243.131 . . . . The revenue certificates issued to finance this construction are all held by the U. S. department of housing and urban development. Accompanying your letter is a copy of a letter from Mr. Samuel N. Evins, chief of the college housing loans branch of the department of housing and urban development, wherein approval for this construction is given with a finding that the plans fall within the bond resolution upon which the certificates were based.

I am, therefore, of the opinion that no specific legislative authorization is required in order for you to proceed with the accomplishment of this project.

069-22—April 9, 1969

#### TAXATION

#### MUNICIPAL MILLAGE—CONSTRUCTION OF § 167.441[§ 200.081], F. S., AS TO THE MEANING OF "SPECIAL BENEFITS" AND "DEBT SERVICE"

To: *Robert D. Zahner, Assistant City Attorney, Coral Gables*

#### QUESTION:

Section 167.441, [now § 200.081], Florida Statutes, provides that the 10 mill limitation does not include special benefits and debt service on obligations issued with the approval of those taxpayers subject to ad valorem taxes on real and tangible personal property. The Retirement Ordinance of the City of Coral Gables was approved by the voters of the City of Coral Gables and the City's contribution is equal to approximately 1.25 mills of the 1968 tax. In that this ordinance was approved by the voters, would this 1.25 mills be exempt from the millage limit as set forth in § 167.441[§ 200.081], F. S.?

The millage in question is not, in my opinion, exempt from the limit stated in § 167.441[§ 200.081], F. S. The levies for "special benefits" excluded by the statute are special assessments, or assessments for special benefits, as the term has been used in the past to distinguish such assessments from ad valorem taxes for general or special purposes. *Crowder v. Phillips*, 146 Fla. 423, 1 So.2d 629, 631; *Fisher v. Bd. of C.C.*, Fla. 19, 84 So.2d 572, 577; AGO 068-85, Biennial Report of the Attorney General, July 23, 1968, pp. 299-302. The millage imposed by the above-described ordinance apparently does not meet the usual criterion for special assessments, i.e., some enhancement of the value of the property affected. In the absence of this factor, approval by voters is not determinative under the terms of the statute.

The further exclusion of the statute is for debt service on obligations approved by taxpayers, which do not appear to be involved in the situation presented.

069-23—April 9, 1969

### TAXATION

#### MUNICIPAL POWER TO LEVY SPECIAL TAX INDEPENDENT OF ANNUAL INCREASE PERMITTED BY \*§ 193.031(1), F. S.

To: Robert C. Nettleton, City Attorney, Haines City

#### QUESTIONS:

1. Can the City of Haines City levy and collect a special tax for the specifically enumerated improvements and uses under authority of Section 100 of Ch. 12790, Laws of Florida, 1927, if the total millage levied under Sections 99 and 100 of said chapter, does not exceed 10 mills, as limited by § 9(b), Art. VII, State Const., 1968, and § 167.441[§ 200.081], F. S.?

2. In what manner does \*§ 193.031(1), F. S., affect this special taxing power, if at all?

Sections 99 and 100 of Ch. 12790, Laws of Florida, 1927, the city charter, provide:

Sec. 99 *Levies.*—The City of Haines City shall have power to levy taxes each year in an amount necessary for the ordinary purposes of the municipality, provided, that such levy shall be at a rate not to exceed fifteen (15) mills of the assessed valuation of the taxable property within its limits, the words "Ordinary Purposes" shall be construed to mean all expenses for salaries of officers and employees, police and fire force, maintenances, cleaning of streets, illumination, water, incidental expenses of the administration of the public business, and all other purposes strictly municipal in their character, which are *annual and continuing*, including reasonable expenditures for advertising and promoting the interests of the municipality through legitimate and recognized mediums for the accomplishment of such purposes, and for promoting the welfare of the people of the city by such means as will contribute toward making the said city more attractive as a place of residence, including establishment and maintenance of public hospitals and libraries. (Emphasis supplied.)

Sec. 100. *Special tax.*—Said municipal corporation may annually levy and collect a special tax for *permanent improvements*, libraries, and the adornment, paving and improvement of the streets and public grounds of the city, and the property of the municipality beyond the limits of the city, which levy shall not exceed one-quarter of one per cent of the assessed value of the taxable property of the city. Said corporation shall also levy and collect annually upon its taxable property aforesaid, such sums as may be necessary to pay interest upon the indebtedness of the city, and for the repairs of its property and public works; to create a sinking fund for the payment of such indebtedness as may be incurred; and to pay the bonds of the city already issued or any bonds which may be issued in accordance with law; to pay any judgment against the city, and any such sums as may be commanded to be levied by any mandamus legally issued against the city. (Emphasis supplied.)

\*Note.—Section 193.031 was transferred to § 200.041 by ch. 69-55, Laws of Florida, which section was repealed by ch. 69-286.

The controlling statute is § 193.031(1), F. S.:

In event of a millage reduction under the provisions of § 193.03, then in each and every year thereafter, the board of county commissioners, board of public instruction, and the governing boards or governing authorities of all other taxing districts, within the several counties including municipalities, may increase the millage to be levied by each such governing authority by no more than ten per cent of what it was in the preceding year; provided, however, nothing in this section shall be construed to authorize an increase in millage in excess of the maximum millage permitted by law.

Because the millage authorized by Section 100 of the charter had not been levied at the time of revaluation, the first question presented should be answered in the affirmative upon the same rationale explained in AGO 068-98, Biennial Report of the Attorney General, Aug. 28, 1968, p. 322 in part: "It seems equally clear and logical that *only* that which is in *existence* is *capable* of being *reduced*. The millage which is to be ultimately reduced *can only be that millage* of the various budget-making authorities *in existence at the time of revaluation*." (Emphasis supplied.)

Although the cited opinion relates to new millages imposed by a separate taxing authority (i.e., a library board), the charter provisions above-quoted are equally clear in describing separate and distinct purposes for the two millage authorizations for the municipality in question, Section 99, Ch. 12790, Laws of Florida, 1927, relating to annual and continuing expenditures and Section 100 of said chapter being limited to permanent improvements and debt expense. Section 193.031(1), F. S., would not, therefore, affect the exercise of taxing power under Section 100 which was not exercised at the time of revaluation, unless the two provisions can be regarded as overlapping in some particular respect. Consideration of the language of the charter, and the facts stated in your inquiry, indicates that millage imposed under Section 100 would not relieve or supplant municipal expenditures of funds derived from millage levies under Section 99. Assuming that to be the case, the proposed levy should be considered new and independent of the restrictions of § 193.031(1), in the absence of any showing of contrary operative effect or use of the new millage.

069-24—April 9, 1969

#### LAW ENFORCEMENT OFFICERS

#### POLICE TRAINING PROGRAMS—AUTHORITY OF POLICE STANDARDS COUNCIL TO ORGANIZE AND SET UP TRAINING PROGRAMS

To: Jack Ledden, Executive Director, Police Standards Council, Tallahassee

#### QUESTION:

What is the statutory authority of the police standards council to establish and maintain training programs?

This authority seems clearly established in § 23.069(1), F. S., which states:

The council shall establish and maintain a police training program with such curriculum and administered by such agencies and institutions as it approves and shall issue a certificate of

completion to any person satisfactorily completing the training program established.

The provisions of § 23.067(3), F. S., giving the council special power to consult and cooperate with agencies and institutions in connection with the employment and training of police officers are not in conflict with the previously stated statute. Together they direct that the council shall function cooperatively with other related groups in the establishment of training programs.

069-25—April 9, 1969

#### TAXATION

##### COUNTY MILLAGE LIMITATION; CONSTRUCTION OF

§ 9(b), ART. VII, STATE CONST.;

§ 193.321[§ 200.071], F. S.

To: *Board of Trustees, Okeechobee General Hospital, Okeechobee*  
QUESTION:

Is there a limitation as to the percentage that millage can be increased for the ensuing year over the previous year?

Limitations on percentage of annual increase of millage are contained in \*§ 193.031, F. S., and apply only after general revaluation and millage reduction under \*\*§ 193.03, F. S. Each year after such revaluation the provision is that each governing authority, or budget-making board, "... may increase the millage to be levied ... by no more than ten per cent of what it was in the preceding year ..." subject to certain emergency provisions detailed in the law. Your question, then, should be answered in the affirmative if in Okeechobee County there has been an "increase in the general level of assessed value" of property within the meaning of § 193.03 and 193.031. If § 193.031 has become applicable and the previous year's levy was 1.41 mills, then the statute would limit the current levy to 1.41 mills plus 10% of 1.41 mills.

Certain limitations are also inherent in the provisions of § 9(b), Art. VII, of the 1968 State Const., and § 193.321(1)[§ 200.071], F. S., that there shall be no aggregate ad valorem tax millage in excess of 10 mills, with certain exceptions, and § 193.321(2)[§ 200.071] providing the board of county commissioners or other budget authority shall have authority, in case of excess aggregate millage, to apportion the millage between the various governing boards of agencies. Recent Attorney General Opinions numbered 069-7, this publication, 068-87, and 068-98, Biennial Report of the Attorney General, 1967-1968, pp. 304 and 321, explain to some extent the effect of these provisions.

069-26—April 9, 1969

#### TAXATION

##### MUNICIPAL MILLAGE UNDER §§ 167.442 AND 167.444

[§§ 200.101, 200.131], F. S. AND § 9(b),

ART. VII, STATE CONST.

To: *Allen Clements, Jr., City Attorney, Miami Beach*

QUESTIONS:

1. Under § 167.444[§ 200.131], F. S., does the 10 mill reduction which becomes effective January 1, 1970, apply to the 1969-1970 budget year of municipalities, or to the 1970-1971 budget year?

2. If § 167.444[§ 200.131], F. S., applies to the 1969-1970

\* Transferred to § 200.041 by Ch. 69-55; repealed by Ch. 69-286.

\*\* Transferred to § 200.031 by Ch. 69-55; repealed by Ch. 69-286.



budget year when would be the latest time that an election under § 167.442[§ 200.101], F. S., could be held in order to increase ad valorem tax millage for the 1969-1970 budget year?

3. If § 167.444[§ 200.131], F. S., applies to the 1970-1971 budget year when would be the latest time that an election under § 167.442[§ 200.101], F. S., could be held in order to increase ad valorem tax millage for the 1970-1971 budget year?

4. Since § 9(b) of Art. VII of the State Constitution establishes a constitutional limit of 10 mills, is § 193.031 of the Florida Statutes which limits a municipality to a 10% annual increase in millage rate inconsistent with the Constitution as applied to municipality which has a millage under 9 mills? In other words, may a municipality which has a tax millage rate of 5 mills for 1968-1969 increase its millage to 10 mills for 1969-1970 without regard to § 193.031 which was enacted prior to the adoption of the Constitution?

#### AS TO QUESTION 1:

Section 167.444[§ 200.131], F. S., provides that municipalities having a rate of taxation in excess of 10 mills "... shall be authorized to continue at such greater rate of taxation until January 1, 1970 .... (Emphasis supplied.)" This provision was enacted as a part of Ch. 67-396, Laws of Florida, which requires, subject to certain exceptions, that: "No municipality shall levy ad valorem taxes... in excess of... (ten mills)...." § 167.441[§ 200.081], F. S. Since the primary mandate of the law is stated as a prohibition against the levy of taxes in excess of the rate specified, the exception, allowing municipalities having higher rates "... to continue at such greater rate of taxation until January 1, 1970, ..." clearly authorizes such municipalities to continue to levy taxes at the existing higher rate until January 1, 1970. See AGO 068-87 Biennial Report of the Attorney General, 1967-1968, p. 304. A levy after that date would therefore be prohibited. The statutory language is such that the terminal date under § 167.444[§ 200.131], like the effective date of § 167.441[§ 200.081], should apply to the time of levy or actual imposition of the tax. The law does not in terms refer to budget years or define the limits of the period to which the higher rate may apply, other than that which is necessarily implied by the requirement that levies under existing law may be made only "... until January 1, 1970, ...." (See AGO 068-87, applying similar statutory language to counties.)

Assuming, that the millage levy for your 1969-1970 budget year is made prior to January 1, 1970, the statutory reduction would not apply.

#### AS TO QUESTIONS 2 and 3:

Section 167.442[§ 200.101], F. S., provides simply that taxpayers may approve a millage above the statutory maximum "... in a referendum called for such purpose ...." There are no time or procedural limitations expressed, or incorporated by reference, for such referendum and, in the absence of contrary requirements under other provisions applicable to elections in the municipality, a millage above the statutory maximum would be conditional only on approval by referendum prior to the time such millage must be finally determined or reviewed under usual budgetary procedure.

#### AS TO QUESTION 4:

Section 9(b) of Art. VII, State Const., provides, so far as material to this inquiry: "Ad valorem taxes ... shall not be levied in excess of the following millages ... for all municipal purposes, ten mills ...." Since the effect of this provision is only to set a maximum millage, it affords no reasonable basis for implied repeal of § 193.031, F. S., which imposes

limits on annual increase in millage after revaluation. The question should be answered in the negative on the same reasoning and precedent outlined in AGO 068-88, Biennial Report of the Attorney General, 1967-1968, p. 308, finding no inconsistency between § 193.031 and the statutory maximum millage provisions of Ch. 67-396, Laws of Florida, § 167.441[§ 200.081], *supra*. In the absence of inconsistency with the 1968 State Const., § 193.031 is, of course, preserved by § 6, Art. XII, of the State Const.

069-27—April 18, 1969

### RESTORATION OF CIVIL RIGHTS

#### PRESIDENTIAL PARDON—QUALIFICATION FOR JURY DUTY

To: Alice S. Ragsdale, Secretary, State Board of Pardons, Tallahassee

#### QUESTION:

When a man is convicted of a felony in a federal court and thereafter receives a presidential pardon, does such pardon restore Florida civil rights lost by reason of such conviction?

In *Story v. State*, 53 So.2d 920, it appeared that juror Speigler had been convicted of the felony of forgery in a federal court; that said conviction disqualified him to be a juror under § 40.07(1), F. S., which at that time read as follows: "No person who is under prosecution for any crime, or has been convicted of bribery, forgery, perjury or larceny, *unless such person shall have been restored to civil rights* shall be qualified to be a juror . . ." (Emphasis supplied.) and that at the *Story* trial Speigler answered falsely when asked whether he had ever been convicted of forgery. It also appeared that Speigler had been granted a Presidential pardon before he sat on the jury in the *Story* case.

In affirming *Story's* conviction, the Supreme Court of Florida said in pertinent part:

*Since it clearly appears that the juror had been granted a Presidential pardon and had learned by discussing the matter with "the Honorable Judge" that he was not in fact disqualified to sit as a member of a jury in this State, we are not led to the conclusion that his false answer operated as a fraud upon the appellant in such manner as to result in the appellant being prejudiced or deprived of a trial by a legal, fair and impartial jury. The false answer did not have the effect of concealing any disqualification on the part of the juror.* (Emphasis supplied.)

\* \* \* \* \*

However, regardless of whether, technically speaking, Mr. Speigler might have been subject to citation for contempt, *the fact remains that he was not disqualified to sit as a juror.* (Emphasis supplied.)

\* \* \* \* \*

*... The fact that juror Speigler was not disqualified is patent; indeed, it is admitted. . . .* (Emphasis supplied.)

Since § 40.07(1) clearly disqualified Speigler as a juror when he was convicted of forgery in the federal court, our Supreme Court's said holding that he was not disqualified to sit as a juror at the *Story* trial was necessarily based upon the theory that the said Presidential pardon

restored his civil rights, among which the right to be a juror was one. That was the only theory upon which he could have been held not to be disqualified, since he was obviously disqualified by § 40.07(1) unless he had been restored to his civil rights and since the Presidential pardon furnished the only means by which they could have been restored. Therefore, your question is answered in the affirmative.

069-28—April 23, 1969

### SCHOOL DISTRICTS

#### DETERMINATION OF BOUNDARIES—CONSTRUCTION OF § 230.061(1), F. S.

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

#### QUESTION:

May the Franklin District School Board continue to use county commission district boundaries for purposes of establishing county school board residence districts for county school board elections?

Your question is answered in the negative. Section 124.01(1), F. S., reads as follows:

There shall be five county commissioner's districts in each county, which shall be numbered one to five, inclusive, and shall be as nearly equal in proportion to population as possible.

Section 230.061(1), F. S., reads as follows:

For the purpose of nominating and electing county school board members, each county shall be divided into five county school board member residence districts, which shall be numbered one to five, inclusive, so as to place in each district, as nearly as practicable, the same number of qualified electors.

The case of Board of Public Instruction of Dade County, *et al. v. State ex rel. Hunter*, 7 So.2d 105 (1942), held:

Patently, it was the purpose of the legislature to provide as nearly as possible equal representation on the board of public instruction based entirely upon population of qualified electors. It is plain from the unequivocal language of the act that it was the duty of the board of public instruction to fix the boundaries of the various districts solely on that basis, with only the qualifications that no impractical plan should be followed and that no voting precinct should be contained partly in one district and partly in another.

In light of the fact that the Franklin County School Board Districts are based on the county commission districts, which are based on population and not qualified electors as required by the above authority, it is my opinion that the Franklin County School Board may not continue to use the county commission districts as a basis for school board districts unless such districts happen to contain a nearly equal number of qualified electors.

069-29—April 23, 1969

### RETIREMENT

#### STATE AND COUNTY OFFICERS AND EMPLOYEES—SIMULTANEOUS RETIREMENT UNDER CHS. 112 AND 122, F. S., PROHIBITED

To: Fred O. Dickinson, Jr., Comptroller, Tallahassee

#### QUESTIONS:

1. Is the final decree of Judge W. May Walker, Second Judicial Circuit, Leon County, Florida, declaring § 7, Ch. 63-555, Laws of Florida, unconstitutional, binding and effective in voiding the present § 122.10(3), Florida Statutes?

2. If so, how would this affect the request of Mr. Wadsworth, and others, as to receiving retirement benefits under both § 112.05 and Ch. 122, Florida Statutes, simultaneously?

Your letter encloses a final decree in the case of James B. Wadsworth v. Farris Bryant, *et al.*, by the Circuit Court of the Second Judicial Circuit, declaring Ch. 63-555, Laws of Florida, unconstitutional for the reason that its title would not put interested persons upon notice as to the changes proposed for Ch. 112, F. S.

In view of the Court's rationale for invalidating § 122.10(3), F. S., it is my opinion that present applicants for retirement benefits are not affected by the decree since the Supreme Court of Florida has held that any defect in the title of a statute is cured by its codification during the next session of the Legislature. *Brewer v. Gray*, 86 So.2d 799(1956). Two such recodifications of § 122.10(3) have taken place since the original defect in title, as found by the Circuit Court.

There is no question but that the decree of the Circuit Court rendered Dec. 8, 1964, was and is binding upon the parties to the litigation. However, the rights of other state employees throughout Florida are not determined by that litigation and any right to assume that the statute is not operative due to a defective title vanished when the laws were recodified in 1965. Even Mr. Wadsworth's full retirement picture remains in considerable doubt due to the narrow ruling of the Circuit Court; the plaintiff had sought a declaration that he was due the benefits of both statutes but the Court refused to so rule. In addition the Supreme Court of Florida has held that a constitutionally defective title is cured by subsequent codification even in the face of a court adjudication of its invalidity. *State ex rel. Badgett et al. v. Lee*, 22 So.2d 804. The party litigant in the instant case did not seek benefits due either to invalidity of the statute or the court decree itself prior to the date upon which the invalidity was cured.

In view of this, it is my opinion that the comptroller is without sufficient authority to grant the party litigant more rights at this point than other state employees under the act. All employees, therefore, applying for benefits subsequent to the 1965 recodification would be prohibited by § 122.10(3) from retiring under § 112.05 and Ch. 122, F. S., simultaneously.



069-30—April 24, 1969

### PLEDGE OF PUBLIC CREDIT

#### CONSTRUCTION OF § 10, ART. VII, 1968, STATE CONST. IN CONNECTION WITH LEGISLATIVE AUTHORITY INVALID UNDER CONSTITUTION OF 1885, AS AMENDED

To: *Ralph L. Thomas, Attorney, Clay County Development Authority,  
Orange Park*

#### QUESTION:

Is new legislation necessary to authorize the Clay County Development Authority to issue revenue anticipation certificates for the purpose of constructing industrial buildings to be leased to private industry whose rent would liquidate the certificates so issued?

It is clear, as recited in your letter, that Ch. 57-1226, Laws of Florida, did attempt to authorize the Authority's "... acquisition of lands, properties and improvements for development, expansion and promotion of industry ... and the construction of buildings and plants for the purpose of selling, leasing or renting such structures to private persons, firms or corporations." But this broad statutory authorization was held in the case of *State v. Clay County Development Authority*, Fla. 1962, 140 So.2d 576, to be ineffective to permit issuance of revenue certificates to construct and lease an industrial building to a private corporation, because such authorization was invalid under the constitutional prohibition against the loan of public credit. Section 10, Art. IX, State Const., 1885.

The 1968 Constitution, § 10, Art. VII, continues that prohibition, providing by additional language that no public agency shall "... use its ... credit to aid any corporation, association, partnership or person; but this shall not prohibit laws authorizing":

\* \* \* \* \*

(c) [T]he issuance and sale by any ... local governmental body of ... revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants to the extent that the interest thereon is exempt from income taxes under the then existing laws of the United States .... (Emphasis supplied.)

This definition and limitation of industrial bonds which may be authorized clearly precludes the existence of any broader or general power in that area, and the implementing legislation contemplated by this provision must, of course, comply strictly with its terms.

Section 6, Art. XII, of the 1968 State Const. preserves only those "... laws in effect upon the adoption of this revision, to the extent not inconsistent with it." Chapter 57-1226, Laws of Florida, is therefore presently effective only to the same extent it was an operative law under the previous constitution, but cannot be given any greater effect by the terms of the new organic provisions. This conclusion follows from the uniform rule of construction requiring that "a constitution should operate prospectively only, unless the words employed show a clear intention that it should have a retrospective effect." Cases collected, *Cooley's Constitutional Limitations*, 8th Ed., Vol. 1, p. 136 *et seq.* The rule is also there acknowledged that "An unconstitutional act, null and void at the time of its passage, cannot be given validity and effect by the adoption of a new

constitution, or an amendment of the old constitution, where the act is not referred to."

Your question is answered in the affirmative: new legislation is necessary to authorize issuance of revenue bonds for projects which would be contrary to the previous constitutional standards.

069-31—May 1, 1969

### TAXATION

#### TAX DEEDS—CONTENT OF DESCRIPTION

To: *Earl R. Adams, Clerk of the Circuit Court, Key West*

#### QUESTION:

Should the tax deed contain just what is on the tax certificate as far as language and description are concerned?

Your question is answered in the affirmative, since there appears to be no departure, by decision or statute, from the rule recognized in very early Florida cases holding that land "... must be sold by the collector and deeded by the clerk in accordance with [the description on the assessment roll]." *Carncross v. Lykes*, 22 Fla. 587. There is authority for the sufficiency of a tax roll description "... by reference to deed of record, giving the book and page number as it appears in the office of the clerk of the circuit court. ..." (*Crawford v. Rehwinkel*, 121 Fla. 449, 163 So. 851), and that "Abbreviations and figures may properly be used in descriptions in tax assessments if they are familiar, easily understood, not misleading, and indicate the thing intended with certainty ..." Fla. Law & Prac., Vol. 23, Taxation § 223, p. 256. Assuming that the above description does incorporate by reference the detailed description of that part of the SE¼ of the designated section of land appearing on the deed recorded in Official Record book 393, pp. 613-616, a tax deed issued on such a record clearly will not amount to official correction of any uncertainty which may exist.

In summary, a tax deed issued under the circumstances described should cover the property as described on the tax roll and certificate, and will effectively convey only that property even if the tax deed attempts to clarify the description by incorporation of the description contained in the record reference.

069-32—May 1, 1969

### TAXATION

#### DETERMINATION OF WHETHER PAYMENT OF COMPENSATION FOR PREPARATION OF TAX ROLL IS TO BE MADE TO NEWLY ELECTED TAX ASSESSOR OR TO PREVIOUS ASSESSOR WHO PREPARED TAX ROLL

To: *Arthur R. Pulskamp, Attorney, Water Management District No. 2,  
Deerfield Beach*

#### QUESTION:

Upon receipt of bill for services from the 1968 Broward County tax assessor who was defeated for reelection, should the district make payment to the former assessor or to the present tax assessor?

The special act controlling payment of compensation for preparation of the tax roll for Water Management District No. 2, § 20(g) of Ch. 61-1969, Laws of Florida, clearly provides that the "tax officers of the county" are the parties authorized to receive payment for these duties performed pursuant to the act:

The tax officers of the county are hereby authorized and directed to perform the duties evolving upon them under this act, and to receive compensation therefor at such rates or charges as are provided by law with respect to similar services or charges in other cases.

Payment should accordingly be made to the present tax assessor, but such payment will, under Florida decisions, be for the use and benefit of his predecessor to the extent necessary to enforce any rights which the former assessor may have against the funds. *National Surety Corporation v. Sholtz*, Fla. 1936, 166 So. 213, Fla. Law & Prac., Vol. 23, Taxation §§ 383-385.

069-33—May 2, 1970

**TRAILER COACHES OR MOBILE HOMES  
REGISTRATION AS MOTOR VEHICLES—TAXABLE  
AS REAL PROPERTY**

To: Arch Livingston, Director, Department of Motor Vehicles, Tallahassee

**QUESTIONS:**

1. Where a trailer coach or mobile home is permanently affixed to the land, assessed as real property by the tax assessor of the county wherein located and homestead exemption granted the owner of such vehicle under § 6, Art. VII of the State Constitution as revised, is such trailer coach or mobile home subject to registration as a motor vehicle?

2. If the answer to the above question is in the negative, are such vehicles subject to registration if the owners thereof are not granted homestead exemption, all other facts being the same?

Both questions are answered in the negative for reasons hereinafter detailed.

Section 1(b), Art. VII of the revised State Const. provides that "*Motor vehicles, . . . and mobile homes, as defined by law, shall be subject to a license tax for their operation . . . but shall not be subject to ad valorem taxes.*" (Emphasis supplied.) Section 6, Art. XII, of the revised State Const. preserves existing laws defining these terms to the extent such laws are consistent with § 1(b), Art. VII, of the revision above-quoted. The Statutes read in part:

**320.01 Definitions . . .**

(1) "Motor vehicle" includes . . . mobile homes . . . house trailers . . . or any type of trailer or vehicle body without independent motive power drawn by or carried upon a self-propelled vehicle, designed for and used either as a means of transporting persons or property . . . or for furnishing housing accommodations, or both, and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power . . .

**320.081 License fees . . .**

(1) This section shall apply only to mobile homes, trailer coaches, house trailers, campers or other vehicles not self-propelled and used for housing accommodations, hereafter referred to collectively in this section as mobile homes. . . .

The present provision that mobile homes "shall not be subject to ad valorem taxes" replaces language of §13, Art. IX, of the former State Const. stating that a license tax for the operation of such vehicles "... shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property," and that such a vehicle "shall be subject to a license tax as an operable motor vehicle regardless of its actual use unless . . . [it] is permanently affixed to the land, in which case it shall be taxable as real property." (Emphasis supplied.)

The latter statement with reference to taxability of permanent fixtures simply expresses a generally prevailing principle of the law of real property. *Illinois Grain Corp. v. Schleman*, Fla. 1959, 114 So.2d 307, 310. 23 Fla. Law & Prac., Taxation §85; 14 Fla. Jur., Fixtures, §2, 9, 18. Its elimination from the present text therefore does not indicate an intent to prohibit taxability of such items as real property.

In the absence of any constitutional expression on the point, structures which become permanently affixed to land would no longer be "motor vehicles," "mobile homes," etc., within the constitutional provision that such "shall be subject to a license tax." Existing statutory definitions of motor vehicles do not expressly or impliedly override the principle by which structures permanently affixed to land have been held taxable as real property. Application of the latter principle to impose ad valorem real property taxation in proper factual circumstances would logically eliminate applicability of license requirements under both constitutional and statutory provisions above noted, so long as such structures remain affixed to real property. Removal or "operation" as vehicles could, of course, make registration and licensing requirements applicable at any time, unless circumstances dictate a contrary conclusion. See AGO 065-34, March 30, 1965 of the Biennial Report of the Attorney General, 1965-1966, p. 47.

The questions presented apparently do not require determination of the effect and validity under §1, Art. VII, State Const., of the statutory provisions above quoted insofar as they impose a license tax without regard to actual use of a vehicle. Cf. *Palethorpe v. Thomson*, Fla. 1965, 171 So.2d 526.

069-34—May 14, 1969

**STATE OFFICERS AND EMPLOYEES****APPLICABILITY OF §112.01, F. S., RELATING TO  
EMPLOYMENT OF PERSONNEL AND ELECTION AND  
APPOINTMENT OF OFFICERS**

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

**QUESTIONS:**

1. Does §112.01, Florida Statutes, prohibit the employment by the State of a person previously convicted of a crime prior to that individual's civil rights being restored by the action of the state board of pardons?

2. Does §112.01, Florida Statutes, pertain to both elective and appointive officers and employees of the state?



The pertinent portions of § 112.01, F. S., provides as follows: "All persons convicted of bribery, larceny, perjury, or any other infamous crime, . . . shall be excluded from every office of honor, power, trust or profit, civil or military, within this state. . . ."

It is to be noted that this section speaks of "every office" (Emphasis supplied.), making no reference directly or indirectly to employment of any kind. Furthermore I find no case construing this statute which would stretch the meaning of these terms to include employment as opposed to the holding of office. I do note, however, that the language refers to "every" office without qualification (Emphasis supplied.); normal construction of the language would indicate that both elective and appointive office holders are included within its terms.

It is my conclusion that § 112.01, F. S., does not prohibit the employment by the state of a person convicted of the specified crimes, although the statute does apply to both elective and appointive officers. It is to be noted that the crime of which the person is convicted must be "... bribery, larceny, perjury, or any other infamous crime, . . . ." For an excellent discussion of cases deciding the meaning of the term "infamous crime," see *Guterman v. State*, by Richard W. Ervin, one of my predecessors in office, 141 So.2d 21, 1st DCA, 1962.

As to employees, both questions are answered in the negative. As to officers, the statute does not distinguish between those elected and those appointed. Both are clearly covered.

069-35—May 20, 1969

#### OFFICER OR PUBLIC OFFICER

#### APPLICABILITY OF § 112.061, F. S., TO ASSISTANT STATE ATTORNEYS—PER DIEM

To: J. H. Guerry, Executive Director, Judicial Administrative Commission, Tallahassee

#### QUESTION:

Do assistant state attorneys qualify as officers or public officers within the contemplation of § 112.061, Florida Statutes, so as to be entitled to receive up to \$20 per diem for travel on official business?

Section 112.061(2)(c), F. S., provides that:

(2) DEFINITIONS.—For the purposes of this section the following words shall have the meaning indicated:

\* \* \* \* \*

(c) Officer or public officer—An individual who in the performance of his official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the governor and has jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor.

A person cannot be an officer or public officer within the contemplation of said definition unless he is: (1) Elected by the people; or (2) Commissioned by the governor; or (3) A person lawfully serving instead of

either of the foregoing two classes of individuals as the initial designee or successor.

I do not think that any of our assistant state attorneys come within said category (3). That category was designed to cover such situations as exist when a commissioned state attorney becomes unable to function because of illness or injury and the circuit court appoints an acting state attorney pursuant to § 27.16, F. S., while the state attorney is incapacitated, or when a state attorney dies or resigns and the circuit court acts under said statute and appoints an acting state attorney to serve until a successor state attorney is appointed and commissioned by the governor. The acting state attorney appointed in either of these situations would not be elected by the people or commissioned by the governor but would nevertheless be an officer or public officer under the foregoing definition because he would come within category (3).

The result is that in my opinion an assistant state attorney is not an officer or public officer within the contemplation of § 112.061 unless he is either elected by the people or commissioned by the governor. None of our assistant state attorneys were elected by the people. Some assistant state attorneys qualify as officers or public officers because they hold office under commissions issued by the governor. Other assistant state attorneys do not qualify because they were neither elected by the people nor commissioned by the governor.

Under the statutes which later became §§ 27.21 and 27.22, F. S., the governor appointed all assistant state attorneys. He issued commissions to such appointees. Since some assistant state attorneys still serve under such commissions, they come within the above-quoted definition of officer or public officer.

In 1956, § 9B, Art. V, was added to the State Const. It required, among other things, that all assistant state attorneys of the 11th judicial circuit be appointed by the state attorney. Since the governor does not commission assistant state attorneys appointed by the state attorney of the 11th judicial circuit pursuant to the command of said constitutional provision and such assistants are not elected by the people, they do not qualify as officers or public officers under the above-quoted statutory definition.

In 1958, § 9C, Art. V, was added to the State Const. It provided, among other things, for the appointment of the assistant state attorneys of the 13th judicial circuit by the state attorney. In 1966 said § 9C was amended but it still provides for the appointment of the assistant state attorneys of said circuit by the state attorney. Since the governor does not commission assistant state attorneys appointed by the state attorney of said 13th judicial circuit and since the assistants so appointed are not elected by the people, they do not qualify as officers or public officers under the above-quoted statutory definition.

In 1962, § 9A, Art. V, State Const., was amended so as to provide, among other things, for the appointment of assistant state attorneys for the 4th judicial circuit by the state attorney of that circuit. Since assistant state attorneys so appointed are not commissioned by the governor or elected by the people, they do not qualify as officers or public officers within the above-quoted statutory definition.

In 1967 the legislature enacted what is now § 27.181, F. S., providing, among other things, that:

- (1) Upon the expiration of the term of office being served by each assistant state attorney who holds such office on the date this act becomes effective, such office shall stand abolished. Also, each office of assistant state attorney not held by an incumbent

on the date this act becomes effective shall stand abolished on the effective date hereof. Upon the abolition of any office of assistant state attorney under the provisions of this act, there shall thereupon be a position of assistant state attorney in lieu of such office. The state attorney of the judicial circuit in which any such position is created shall appoint an assistant state attorney to hold such position and shall thereafter fill by appointment such vacancies in such position as may from time to time occur. . . .

The assistant state attorneys appointed by state attorneys under said § 27.181 are neither commissioned by the governor nor elected by the people and therefore they are not officers or public officers under the above-quoted statutory definition.

Therefore, it is my opinion that assistant state attorneys who serve under commissions issued by the governor as the result of appointments made by him under either § 27.21 or § 27.22, F. S., are public officers and may receive, under § 112.061(6)(c), F. S., up to \$20 per diem while traveling on official business; and that all other assistant state attorneys who serve under appointments by state attorneys (whether under § 9A, 9B or 9C of Art. V of the State Const., or under § 27.181, F. S.) are not officers or public officers under the above-quoted statutory definition and, therefore, under § 112.061(6)(d), they may receive up to \$17 per diem while traveling on official business.

The views expressed above have been arrived at with awareness that, insofar as they relate to the 11th and 13th judicial circuits, they conflict with the views expressed by one of my predecessors in office in AGO 063-72, July 8, 1963, Biennial Report of the Attorney General, 1963-1964, pp. 110-113. That opinion in effect held that assistant state attorneys appointed by the state attorneys of the 11th and 13th circuits were officers or public officers under the definition contained in § 112.061(2)(c), *supra*. Said AGO 063-72 took note of the fact that the above-mentioned §§ 9B and 9C of Art. V, State Const., provided for the appointment of assistant state attorneys of the 11th and 13th circuits by the state attorneys of said circuits and went on to say:

... The fact that assistant state attorneys in the 11th and 13th judicial circuits are not appointed or commissioned by the governor should not be held to make any difference between them and other assistant state attorneys, as to their rights under § 112.061, F. S.

\* \* \* \* \*

... The fact that assistant state attorneys may be appointed without the issuance of a commission, will not take them out of the operation of § 112.061, F. S., as amended, they having the same powers and duties as other assistant state attorneys appointed by the governor.

I think that at the time said AGO 063-72 was rendered, § 112.061(2)(c), F. S., as amended by Ch. 63-400, Laws of Florida, mandatorily required that in order to be an officer or public officer, an assistant state attorney had to be either elected by the people or commissioned by the governor. Assistant state attorneys appointed by the state attorneys did not meet this essential requirement; hence my disagreement with the views thus expressed in said AGO 063-72 as to the 11th and 13th circuits. As above indicated, I have the same opinion as to the present § 112.061(2)(c), which is to the same effect as it was when said opinion was rendered.

069-36—May 27, 1969

GAME AND FRESH WATER FISH COMMISSION

APPOINTMENT OF MEMBERS PURSUANT TO § 9, ART. IV,  
STATE CONST.—CONFIRMATION BY SENATE  
NOT REQUIRED

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Is senate confirmation of appointees to the game and fresh water fish commission, made subsequent to the effective date of the State Constitution of 1968, required?

This question is answered in the negative. Section 30, Art. IV, of the State Const. of 1885, as amended, provided for the appointment by the governor and confirmation by the Florida Senate of members selected and appointed by the governor to fill vacancies occurring in the membership of the Florida Game and Fresh Water Fish Commission. A vacancy occurred in the membership of said game and fresh water fish commission on Jan. 5, 1969, prior to the effective date of the State Const. of 1968 on Jan. 7, 1969. The new member was commissioned on Feb. 4, 1969, subsequent to the effective date of the State Const. of 1968.

Section 372.01, F. S., requires that members of the game and fresh water fish commission "shall be appointed by the governor, subject to confirmation by the senate."

Section 9, Art. IV, of the State Const. of 1968, which became effective on Jan. 7, 1969 [§ 4, Art. XVII, of the State Const. of 1885, as amended at the general election in 1964], amended and revised § 30, Art. IV, of the State Const., as amended, relating to the game and fresh water fish commission, so as to delete from the constitutional law the requirement previously contained for confirmation by the senate. This had the effect of no longer requiring senate confirmation of the appointees to the game and fresh water fish commission. The effect of the adoption of the State Const. of 1968 was to supersede and repeal the requirements for senate confirmation required in said former § 30, Art. IV, of the State Const. of 1885, as amended, and to supersede and repeal the provision in § 372.01, F. S., for senate confirmation.

The requirement for senate confirmation having been deleted from Florida law prior to the convening of the 1969 Legislature, confirmation is not required. The provisions for confirmation by the senate in former § 30, Art. IV, of the State Const. of 1885, as amended, as to members of the game and fresh water fish commission, and the provisions of § 372.01, F. S., were repealed and deleted by § 9, Art. IV, of the State Const. of 1968.

The requirement in said § 30, Art. IV, of the State Const. of 1885, as amended in 1942, requiring selection of members from congressional districts, having been deleted by the State Const. of 1968, has also been repealed and is no longer applicable so that appointments may be made from anywhere within the state.

You are no longer required to notify the secretary of the Florida senate of the said appointment made by the governor. Such requirement has been withdrawn by the adoption and effective date of the State Const. of 1968. The senate no longer has any jurisdiction over said appointments.



069-37—June 10, 1969

## TAXATION

HOMESTEAD EXEMPTION—CONSTRUCTION OF § 6(a), ART. VII,  
STATE CONST., AND § 192.14[§ 196.051], F. S.To: *DeVane Mason, Tax Assessor, Quincy*

## QUESTIONS:

1. A party who owns one half interest in a lake cottage and rents a house in town has applied for homestead exemption for 1969. This is the only property he owns in this county. He spends some time at the lake house. How much, if any, homestead exemption is he entitled to?

2. A student, who lives on campus, owns a lake cottage in this county. He owns no other property in this county. He has applied for homestead exemption for 1969. Is he entitled to homestead exemption?

3. A party who works and lives in another state and has a caretaker living in his house has applied for homestead exemption in this county for 1969. It is my understanding the caretaker pays no rent. Is this party entitled to homestead exemption?

Article VII, § 6(a) State Const. states: "Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon . . ." The courts have construed this section as requiring actual residence upon the property claimed as a homestead. *Matthews v. Jeacle*, 55 So. 865; *Lanier v. Lanier*, 116 So. 867.

However, § 192.14[§ 196.051], F. S., provides that: "The words . . . 'permanent residence' . . . shall not be construed so as to require continuous physical residence on the property, but mean only that place which the person claiming the exemption may rightfully and in good faith call his home to the exclusion of all other places where he may, from time to time, temporarily reside." In *Lanier v. Lanier*, *supra*, it was held that temporary absence from the homestead for health, pleasure, or business reasons would not deprive the property of its homestead character. See also *Collins v. Collins*, 7 So.2d 443; *Hillsborough Inv. Co. v. Wilcox*, 13 So.2d 448. It was further stated that temporary absence, regardless of the reason for such, will not deprive it of homestead character, providing an abiding intention to return is always present. This abiding intention to return is not to be determined from the words of the homesteader, but is a conclusion to be drawn from all the applicable facts. *City of Jacksonville v. Bailey*, 30 So.2d 529.

The intention to return or to reside thereon must be in good faith. "The Supreme Court of Florida has defined the words 'good faith' as 'a concrete quality, descriptive of the motivating purpose of one's act or conduct when challenged or called in question.'" *Judd v. Schooley*, 149 So.2d 587, reversed 158 So.2d 514. This definition of good faith should be of benefit to all tax assessors when attempting to arrive at a decision in any given situation. Attorney General Opinion 068-33, March 6, 1968, Biennial Report of the Attorney General 1967-1968, pp. 219-221.

Considering the aforementioned:

## AS TO QUESTION 1:

A determination of the party's eligibility for a homestead exemption must be predicated on an examination of all the applicable facts. In the

event that your office interprets the situation to warrant the granting of a homestead exemption, said exemption must be based on the party's proportionate share of the assessed valuation of the entire structure. *Overstreet v. Tubin*, 53 So.2d 913. See also *Gautier, Tax Assessor v. State, ex rel. Safra*, 127 So.2d 683; *Smith v. Guckenheimer*, 27 So. 900.

#### AS TO QUESTION 2:

Statement as to the first question is applicable with the understanding that if the student is a minor, then the general rule in this state that the domicile of a minor child, during minority, follows that of its parents should be considered. See *Chisholm v. Chisholm*, 125 So. 694; 28 C.J.S. 21, § 12.

#### AS TO QUESTION 3:

Attorney General Opinion 057-90, April 8, 1957, Biennial Report of the Attorney General, 1957-1958, pp. 94, 95, rendered to the Honorable Ray E. Green, treats the legal questions raised by this inquiry. I would point out that the status of the caretaker does not seem to be one of legal or natural dependence on the owner.

**\*069-38—June 11, 1969**

### TAXATION

#### HOMESTEAD EXEMPTION—CONSTRUCTION OF § § 196.031 AND 196.041, F. S., AND ART. VII, § 6, STATE CONST., IN CONNECTION WITH DUPLEX UNITS

To: *Richard Deeb, State Senator, St. Petersburg*

#### QUESTIONS:

1. Does the owner of one half of a duplex as of January 1, 1969 have the right to homestead exemption on that half of the duplex for the 1969 tax year?
2. If question 1 is answered in the negative, would the owner be entitled to the exemption for the 1970 tax year?

The recent decision of the Florida Supreme Court in *Ammerman, et al. v. Markham*, May 7, 1969, found Ch. 67-339, Laws of Florida, to be an effective legislative redefinition of the term "dwelling house" to include each unit of cooperative apartments and condominium parcels, under the former constitutional provision Art. X, § 7, State Const., that "... no such exemption of more than five thousand dollars shall be allowed ... on any one dwelling house." Chapter 67-339 (§ § 196.031 and 196.041, F. S.), Laws of Florida, however, does not relate to units "owned in fee simple by separate owners," as in the case of duplexes which were held in *Overstreet v. Tubin*, 53 So.2d 913, to be entitled to only one exemption for both units as a single dwelling house under the former constitution. Cf. Ch. 711, F. S., for definition of condominium interests.

The Ammerman opinion also states as to exemptions for the 1969 tax year: "The Fla. Const. 1968 became effective on January 7, 1969, six days after the exemption status of the property was determined, and, therefore, does not apply. . . ." In this respect, although the Court held Chapter

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\*This opinion incorporates the substance of a subsequent letter to Sen. Deeb, dated July 8, 1969, written in response to a further inquiry from the senator dated June 13, 1969.

67-339, Laws of Florida, was by its own terms made effective when the new constitution was approved or adopted by referendum prior to January 1, 1969, so as to exempt condominiums and cooperative units for the current year, it nevertheless affirmed the reasoning detailed in a previous opinion of this office, AGO 068-110, Dec. 20, 1968, Biennial Report of the Attorney General, 1967-1968, pp. 345-348, as to the *nonretrospective* operation of the 1968 constitutional provisions with reference to eligibility of residential units for homestead exemption without regard to the former "dwelling house" limitation:

Art. VII, §6(b): Not more than one exemption shall be allowed . . . with respect to any residential unit.

Art. XII, §7(b): This revision shall not be retroactive so as to create any right . . . which did not exist under the Constitution of 1885, as amended, based upon matters occurring prior to the adoption of this revision.

I conclude that on Jan. 1, 1969, there existed no statutory or constitutional basis for abandonment of the Overstreet rule that duplex units together constitute a single dwelling house for homestead exemption purposes. Your question is accordingly answered in the negative for the 1969 tax year.

It may be noted, however, that the ruling in Ammerman that the 1968 State Const., "does not apply" as of Jan. 1, 1969, for homestead exemption purposes, may not have been essential to the point decided in that case, i.e., that Ch. 67-339, Laws of Florida, was within the legislative prerogative and became effective by its own terms in Nov., 1968. A contrary view as to applicability of the present self-executing constitutional homestead exemption provisions in the current year might be based on the language of Art. XII, §7(b), *supra*, which limits retroactivity only as to "matters occurring prior to the adoption of this revision." (Emphasis supplied.) The Ammerman opinion indicates adoption to be an act or fact occurring at the time of favorable vote rather than at the effective date of the new constitution. Although Jan. 1 is, as stated in Ammerman, "the date on which certain facts must exist to entitle taxpayers" to exemptions, it is clear that retroactive application of provisions of law in this area generally is considered a matter of construction or intendment. *State v. Green*, Fla. 1958, 101 So.2d 805.

My answer to the first question was based on the decision in *Overstreet v. Tubin*, Fla. 1951, 53 So.2d 913, holding a duplex to be entitled to only one exemption for both units under Art. X, §7, State Const. 1885, which imposed a \$5,000 exemption limit on "any one dwelling house."

The 1968 State Const., Art. VII, §6, does not contain that limitation; but provides:

Not more than one exemption shall be allowed any individual or family unit or with respect to any residential unit.

This provision of the 1968 State Constitution will control duplex exemption on Jan. 1, 1970, and provides authority for the exemption of each residential unit.

Assuming all other homestead requirements are met, your second question as to whether "after 1969 the owner of one half of a duplex would be entitled to homestead exemption," is therefore answered "yes."

069-39—June 13, 1969

**PUBLIC SCHOOL INSTRUCTIONAL PERSONNEL  
ELIGIBILITY OF RESIGNED TEACHER FOR CONTINUING  
CONTRACT—CONSTRUCTION OF § 231.36(3)(a)  
AND (d), F. S.**

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

**QUESTION:**

Under what circumstances may a teacher who is being reemployed by the school board after having submitted his resignation be awarded a continuing contract?

In AGO 068-41, Mar. 13, 1968, Biennial Report of the Attorney General, 1967-1968, p. 231, and in my letter to you of April 15, 1969, the question of a resigned teacher's eligibility for continuing contract was discussed. I adhere to the conclusions reached in the aforementioned opinion and letter and will now discuss those conclusions in *pari materia* in order that there are no questions on the part of those charged with administering the teacher contract provisions of the Florida Statutes.

Pertinent to this discussion are two sections of the Florida Statutes which deal with the granting of continuing contracts. The first is § 231.36(3)(a), hereafter referred to as paragraph (a), which provides, among other things, that a teacher who has completed three years of service in the same county of the state during a period not in excess of five successive years, such service being continuous except for leave duly authorized and granted, who has already been appointed for the fourth year, who holds a regular certificate and who has been recommended by the county superintendent for a continuing contract shall be entitled to and shall be issued a continuing contract.

Section 231.36(3)(d), F. S., hereafter referred to as paragraph (d), provides that a county board may issue a continuing contract to a member of the instructional staff after two years' employment in the county, provided such individual has previously held a continuing contract in a county within this state.

It will be noted that the provisions of paragraph (a) make mandatory the issuance of a continuing contract to a teacher who has fulfilled the requirements thereof. Paragraph (d) is permissive and not mandatory in that it authorizes but does not require the issuance of a continuing contract under the circumstances stated therein.

For the purpose of this discussion let us assume the following six examples and the pertinent facts relative to each:

Teacher 1 was in his second year of employment on an annual contract basis and had never held a continuing contract in the State of Florida. During that year he submitted his resignation to the county school board and the board accepted the resignation. Thereafter he was reemployed by the same county school board. When may he be eligible for a continuing contract?

Teacher 2, never having held a continuing contract, was in his second year of annual contract employment. During that year he submitted his resignation to the county school board. Simultaneously with the submission of his resignation he absented himself from the classroom for a number of days. The school board refused to accept his resignation and granted him leave of



absence for the period of time that he was not in school. He returned to his classroom and continued his employment with the county school board. When will he be eligible for a continuing contract?

Teacher 3, having completed three years of continuous service in the subject county and having fulfilled the other requirements of paragraph (a), had been issued a continuing contract. He submitted his resignation to the county school board and his resignation was accepted. Subsequently he was reemployed by the same county school board and the question arises as to whether the reemployment should be under annual contract or continuing contract.

Teacher 4 had at one time held a continuing contract in another county of the state. He came to the subject county and after teaching two years under an annual contract was issued a continuing contract under the provisions of paragraph (d). He served one full year under his continuing contract and during his second year of service thereunder submitted his resignation to the county school board, which resignation was accepted. Subsequently he was reemployed by the same county school board and the question arises whether reemployment should be under annual or continuing contract.

Teacher 5 had at one time held a continuing contract in another county of the state. He came to the subject county and after teaching two years under an annual contract was issued a continuing contract under the provisions of paragraph (d). During his first year of employment under the continuing contract he submitted his resignation to the county school board and his resignation was accepted. Subsequently he was reemployed by the same county school board and the question arises as to whether reemployment should be under annual or continuing contract.

Teacher 6 was serving under a continuing contract. He submitted his resignation to the county school board and absented himself from his teaching duties. The school board chose not to accept his resignation, but rather granted him a leave of absence for the time he was not teaching, after which he returned to the classroom to continue his duties. Is his continuing contract status affected thereby?

The provisions of paragraph (a) above contemplate that in order to qualify initially for a continuing contract a teacher must perform three years of continuous teaching service. If such service is interrupted by leave duly authorized and granted such interruption shall not be construed as breaking the continuity of service. If, however, his continuity of service was interrupted other than by leave duly authorized and granted, the teacher must begin anew his three years of service in order to qualify for a continuing contract.

In example one, given above, Teacher 1's service was interrupted by his resignation, which was accepted, and thus his continuity of service was interrupted other than by leave duly authorized and granted. He must therefore begin anew his three years of annual contract service and must complete such service before he will be eligible for a continuing contract.

In example two, teacher 2's service was interrupted by leave duly authorized and granted and, therefore, the service completed prior to such

interruption will count toward his three years of annual contract service as a prerequisite to the granting of a continuing contract. When he completes three years of service within a five-year period, including that performed prior to the interruption by leave authorized and granted, he will be eligible for continuing contract, assuming all other requirements of law are met by him.

In example three, teacher 3 in the subject county had fulfilled all the requirements of paragraph (a). There being no requirement in paragraph (a) that the three years continuous annual contract service immediately precede the granting of a continuing contract, I am of the opinion that if at any time teacher 3 is reemployed by the subject county he must be reemployed on a continuing contract because he has met the requirements of paragraph (a).\*

In example four, teacher 4, at the time he was initially issued a continuing contract, had not fulfilled the requirements of paragraph (a) but was issued a continuing contract pursuant to the permissive provisions of paragraph (d). However, prior to his resignation he in fact completed three years of uninterrupted service in the subject county, two years of which were under annual contract and one of which was under continuing contract. Now, therefore, if he is to be reemployed he must be considered to have fulfilled the requirements of paragraph (a) and must be granted a continuing contract.

In example five, teacher 5's continuing contract had been granted to him under the permissive provisions of paragraph (d) inasmuch as he had not fulfilled service requirements of paragraph (a). Even at the time he submitted his resignation, he had not completed three years' continuous service in the county. When he submitted his resignation and it was accepted, his service was interrupted other than by leave duly authorized and granted. If he is to be reemployed by the county, the school board, at

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\*The portion of the opinion relating to example three was supplemented by a subsequent letter to Representative Tommy Stevens, dated July 29, 1969. Representative Stevens posed a situation similar to example three but in which the teacher had already been reemployed on an annual contract. His question was whether that teacher would be entitled to back pay in the amount of the difference of the salary of an annual contract teacher and a continuing contract teacher.

The attorney general responded in pertinent part as follows:

Section 231.36(3)(c), Florida Statutes, provides that the three-year period of annual contract service for which the law provides may be extended to four years when prescribed by the county board and agreed to in writing by the employee at the time of re-employment. Therefore, if the board decided that the subject teacher was to be re-employed on an annual contract, it could do so for one additional year if the teacher agreed in writing. When the teacher signed the annual contract he did, in fact, agree in writing to the fourth year of annual contract service.

I am therefore of the opinion that in the example cited in your letter the teacher was not entitled to the salary of a continuing contract teacher for the year during which he was re-employed on an annual contract basis.

its option, may grant him a continuing contract under the permissive provisions of paragraph (d) inasmuch as he had completed two years of service in the subject county and had previously held a continuing contract in another county. Because the provisions of paragraph (d) are permissive the school board is not required to issue that teacher a continuing contract, but may issue him an annual contract and may require him to fulfill three years of continuous service uninterrupted other than by leave duly authorized and granted before issuing him a continuing contract. Upon completion of three such years service it must then issue him a continuing contract if he is to be reemployed for the fourth year. For any year prior to the completion of three years' uninterrupted service the board may, however, at its option, issue him a continuing contract under the permissive provisions of paragraph (d).

In example six, teacher 6's resignation was not accepted and he was granted leave for the period of time that he was absent. Therefore, his continuing contract status with the board is not adversely affected and he continues his service under his continuing contract.

069-40—June 25, 1969

#### PUBLIC OFFICERS

#### COSTS AND EXPENSES INCURRED BY INDICTED AND SUSPENDED COUNTY COMMISSIONERS IN OPPOSITION TO CHARGES AS COUNTY OBLIGATION

To: *Ray C. Helms, Clerk Circuit Court, Milton*

#### QUESTION:

Is it legal to pay out of county funds the expenses, costs, and attorneys' fees, incurred in defense of a county commissioner against criminal charges in connection with the operation of his office and charges made against him by the governor in his order suspending the said commissioner from office?

Charges against persons charged with crime, whether by indictment, information, affidavit, or otherwise, are proceedings in court. Charges brought by the state against public officers, under and pursuant to § 15, Art. IV of the State Const. of 1885 and § 7, Art. IV of the State Const. of 1968 are nonetheless proceedings brought by the state for the purpose of suspension or removal of public officers. These proceedings may be compared to impeachment proceedings brought by the house of representatives and tried by the senate or suspension and removal proceedings provided for in § 15, Art. IV, of the State Const. of 1885, which may be said to have been a substitute for impeachment proceedings as to the public officers mentioned therein.

Suspension and removal proceedings are provided by § 15, Art. IV, of the State Const. of 1885 and § 7, Art. IV, of the State Const. of 1968 for suspension and removal of officers who are guilty of malfeasance, misfeasance, neglect of duty in office, the commission of a felony, drunkenness, and incompetency, with the exception of those officers liable to impeachment. The charges of malfeasance, misfeasance, neglect of duty, commission of a felony, drunkenness, and incompetency are charges against the personal action, or nonaction, of the officer, either by himself or through an agent of such officer for which he is responsible.

In *Schieffelin v. Henry*, 206 N.Y.S. 172, 174 Affirmed 152 N.E. 436, the court stated in substance that:

... [T]here is no constitutional power to reimburse a public officer for expenses incurred in defending criminal *prosecutions for official acts or omissions*, unless a statute provides therefor in advance. ... [I]f prospective in effect the conditional promise to reimburse contained therein is regarded as a part of the compensation which the state, city, or town ... stipulates that an officer is to receive in return for services to be rendered. Ordinarily, where a public official defends himself on a charge of crime he benefits nobody but himself, and any expenditure incurred thereby is not for a city purpose, but for the purely personal and private purpose of keeping himself out of jail. (Emphasis supplied.)

It is stated in *Amos v. Mathews*, 99 Fla. 1, 126 So. 308, text 322, that, "It is clear, therefore, that our Constitution contemplates that an exclusively state purpose must be accomplished by state taxation; an exclusively county purpose, in which the state has no sovereign interest, by county taxation. ..."

It has long been the policy of the Florida courts that county funds may be used only for the purpose of meeting "county purposes" or expenses and that such funds may be used only for the payment of county indebtedness and for other county purposes. In other words, county funds may be used only for county purposes and the meeting of obligations incurred in carrying out county purposes. (*Gadsden County v. Green*, 22 Fla. 102, text 110; *Skinner v. Henderson*, 26 Fla. 121, 7 So. 464; *Stockton v. Powell*, 29 Fla. 1, 10 So. 688; *Duval County v. City of Jacksonville*, 36 Fla. 196, 18 So. 339, text 341; *Jordan v. Duval County*, 68 Fla. 48, 66 So. 298, text 299; *Lewis v. Leon County*, 91 Fla. 118, 107 So. 146, text 152-154; *Earle v. Dade County*, 92 Fla. 432, 109 So. 331, text 332; *Amos v. Mathews*, 99 Fla. 1, 126 So. 308, text 322; *Palm Beach County v. State*, 99 Fla. 379, 126 So. 361; *Florida Power Corporation v. Pinellas County Utility Board*, Fla., 40 So.2d 350, text 354; *Seaboard Air Line Railway Company v. Peters*, Fla., 43 So.2d 448, text 453-455). This leads to the further question of whether attorneys' fees, costs, and expenses incurred by said members of the board of county commissioners of Santa Rosa County were in fact incurred for a legal and valid county purpose.

In *Duval County v. City of Jacksonville*, 36 Fla. 196, 18 So. 339, text 341, it was stated that, "The legislature cannot authorize counties to levy taxes for any other than county purposes, nor can counties be authorized to devote money so raised to any other than such purposes."

Upon the question of what constitutes, or does not constitute, a county purpose, see *Lewis v. Leon County*, 91 Fla. 118, 107 So. 146, text 152-154; *Earle v. Dade County*, 92 Fla. 432, 109 So. 331, text 332; *Florida Power Corporation v. Pinellas County Utility Board*, Fla., 40 So.2d 350, text 354 and 355; *Seaboard Air Line R. Co. v. Peters*, Fla., 43 So.2d 448, text 453-455. See also definitions of "county purpose" collected in 10 Words and Phrases, Perm. Ed., pages 149-157. It is stated in 67 C.J.S. 329, § 91, that "the right of an officer to compensation, for expenses incurred by him in the performance of his official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication. ..."

In *City of Del Rio v. Lowe, et al*, Tex. Civ. App., 111 S.W.2d 1208, text 1220, the Texas Court of Civil Appeals, the court said that:



...[T]he city was not the injured party and the city had a direct interest in prompting the enforcement of its own laws, but where the city is the injured party, as the result of the officer's acts in committing an offense against the city, it cannot be said that an appropriation of the city's funds for the defense of such officers will be inducive to better regard for the laws and rights of the city, nor is such use of city funds for a municipal purpose or for the general welfare and benefit of the public. *Davis v. City of Taylor*, 123 Tex. 39, 67 S. W. 2d 1033; *Chapman v. New York*, 168 N. Y. 80, 61 N. E. 108, 56 L. R. A. 846, 85 Am. St. Rep. 661; *Schieffelin v. Henry*, 123 Misc. 792, 206 N. Y. S. 172, affirmed 215 App. Div. 706, 212 N. Y. S. 914; *Id.* 242, N. Y. 581, 152 N. E. 436; *In re Jensen*, 28 Misc. 378, 59 N. Y. S. 653, affirmed 44 App. Div. 509, 60 N. Y. S. 933; 44 C. J., p. 113, *Hotchkiss v. Plunkett*, 60 Conn. 230, 22 A 535.

In *Rawls v. State*, 98 Fla. 103, 122 So. 222, the court remarked that "Public officers have no legal claim for official services rendered, except when, and to the extent that, compensation is provided by law, and when no compensation is so provided, the rendition of such services is deemed to be gratuitous."

These observations and authorities require a negative answer to your question in the absence of a statute or law expressly providing otherwise.

069-41—June 26, 1969

#### TAXATION

##### FREEHOLDER APPROVAL OF SCHOOL DISTRICT MILLAGE UNDER § 9(b), ART. VII, STATE CONST.

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

#### QUESTION:

Is a two-year, 6-mill school district tax which was authorized for the Marion County School Board, by vote of "qualified electors who pay a tax on real or personal property" in the 1967 general election under §§ 236.31 and 236.32, F. S., excluded from the constitutional millage limitations contained in Art. VII, § 9(b), State Const., 1968?

The provision of Art. VII, § 9(b) State Const., is that the maximum millage limitations stated in that section shall not apply to taxes levied "for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation. . . ." (Emphasis supplied.) Because the tax involved in the above inquiry was authorized only by vote of "electors who pay a tax on real or personal property," it is not a tax authorized by vote of "electors who are owners of freeholds." This millage is therefore not excluded from the language of Art. VII, § 9(b), prohibiting the levy of taxes "in excess of the following millages . . . for all school purposes, ten mills. . . ."

Authorization by a "vote of the electors who are owners of freeholds" clearly contemplates that the vote shall be only by electors who have "an immediate beneficial ownership interest, legal or equitable, in the title to a fee simple estate in land." This has been the uniform definition of freeholds under Florida law: *Dean v. State*, Fla. 1917, 77 So. 107; *Town of Coreytown v. State*, Fla. 1952, 60 So.2d 482, 488; *Bd. of Pub. Instr. v.*

State, Fla. 1960, 119 So.2d 683, 688, construing § 100.241, F. S. 1959; State v. County of Sarasota, Fla. 1967, 197 So.2d 521, 524. Cf. §§ 100.241, 100.251, and 236.32(4), F. S. 1967. A.L.R. Rest. Propt., § 8(a); Words & Phrases, perm. ed., Vol. 17A, p. 273 *et seq.* In previous recognition of this point in the construction of former Art. IX, § 6, State Const., requiring a vote by "freeholders who are qualified electors," AGO 058-294, Oct. 24, 1958, Biennial Report of the Attorney General, 1957-1958, specifically acknowledged that an elector who pays taxes on personal property is not a freeholder. The question stated above should accordingly be answered in the negative.

I believe, however, that the school district tax in question is preserved by the provision in the new State Const., Art. XII, § 2, for continuance of millages authorized in special districts on the effective date of the constitutional revision:

SECTION 2. Property taxes; millages.—Tax millages authorized in counties, municipalities and special districts, on the date this revision becomes effective, may be continued until reduced by law.

Numerous opinions define school districts as special taxing districts under the former constitution: "A special tax school district is therefore . . . a special taxing district for school purposes." (Emphasis supplied.) *Bronson v. Bd. of Pub. Instr.*, 108 Fla. 1, 145 So. 833, 834. See also *Hamrick v. Special Tax School Dist. No. 1 of Jefferson County* (1938), 130 Fla. 453, 178 So. 406; *Lee v. A.C.L. R. Co.*, 1941, 145 Fla. 618, 200 So. 71; *State v. Bd. of Pub. Instr. of Pasco County* for and on behalf of West Pasco County Special Tax School District, Fla. 1965, 176 So.2d 337. Such taxes authorized for the year 1969-1970 would therefore remain assessable.

069-42—June 26, 1969

#### COUNTY OFFICERS

#### COMPENSATION AS FIXED BY CH. 145—REPEAL OF PRIOR SPECIAL LAWS AND GENERAL LAWS OF LOCAL APPLICATION—INDIAN RIVER COUNTY TAX ASSESSOR

To: *Homer C. Fletcher, Tax Assessor, Vero Beach*

#### QUESTIONS:

1. Does § 145.13(2), F. S., as of July 1, 1969, repeal as personal income the compensation payable to the Indian River County Tax Assessor under Chs. 59-619, 65-809, 65-812, and 67-1517, Laws of Florida?

2. If so, is the tax assessor entitled to compensation earned thereunder in the year 1968, of which 20% is retained until the tax collector files his errors and insolvency list which normally is not filed with the board of county commissioners until after July 1 of the year?

3. Is the tax assessor entitled to the compensation provided under the aforementioned laws for the year 1969 for the six months prior to the July 1, 1969 expiration date recited in § 145.13(2), F. S.?

On consideration of the various provisions of the laws above-cited, I conclude that the questions presented should be answered in the affirmative.

Section 145.13(2), F. S., enacted in 1967 as Ch. 67-576, Laws of Florida, provided:

All special laws, local laws, and general laws of local application in conflict with this act, but only such parts thereof as are in conflict with this act, affecting the compensation or salary of any official named herein are hereby repealed effective July 1, 1969, and thereafter the total compensation or salary of any official named herein shall be fixed and designated in full by general law.

Amendments to Ch. 145, F. S., passed by the Legislature June 3, 1969, Senate Bill 1213, Section 9, Ch. 69-346, Laws of Florida, replace the above language by new § 145.131, F. S., stating:

(1) All local or special laws, or general laws of local application enacted prior to July 1, 1969, which relate to compensation of county officials are repealed, except laws pertaining to travel expenses of county officers or to payment of extra compensation to the chairmen of boards of county commissioners or district school boards. Laws relating to the compensation of constables and justices of the peace are also not repealed, and those officials shall be subject to the provisions of existing laws and § 145.14.

(2) After July 1, 1969, the compensation of any official whose salary is fixed by this chapter shall be the subject of general law only . . . .

Although § 145.13(2), Florida Statutes, as a subsequent controlling general law, should be sufficient to support an affirmative answer to the stated questions, any ambiguity arising from language in § 145.13(1), and the other laws designated in your letter, will certainly be eliminated by § 145.131 on its effective date, July 1, 1969.

Section 12 of Senate Bill 1213, Ch. 69-346, Laws of Florida (§ 145.15, F. S.), provides against retrospective effect of salary provisions, and I conclude that this provision, like the effective date stated in § 145.13, F. S., preserves the right to all amounts earned for services rendered prior to July 1, 1969, under provisions of the cited laws which are not repealed until that date.

069-43—June 26, 1969

#### STATE PARKS

#### JURISDICTION OF STATE AGENCY IN CONNECTION WITH ZONING

To: *Dean Tooker, County Attorney, Stuart*

#### QUESTION:

Is the authority and jurisdiction of the \*Florida board of parks and historic memorials over Jonathan Dickinson State Park subject to zoning laws of Martin County?

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\*Note.—Section 25 of Ch. 69-106, Laws of Florida, the governmental reorganization act of 1969, abolished the Florida board of parks and historic memorials and transferred its functions, powers, and duties, to the division of recreation and parks of the department of natural resources.

The answer to the above question is in the negative. The advice here given is predicated upon the language of Ch. 592, F. S., 1967:

**592.01 Florida board of parks and historic memorials created.**—There is created a department of state government which is designated as Florida board of parks and historic memorials . . .

**592.06 Duties of board.**—It shall be the duty of the board to supervise, administer, regulate and control:

(1) The operation of all public parks, including all monuments, memorials, sites of historic interest and value, sites of archeological interest and value owned, or which may be acquired, by the state, or to the operation, development, preservation and maintenance of which the state may have made or may make contribution or appropriation of public funds.

**592.07 Powers of board.**—

\* \* \* \* \*

(2) The board shall make and publish such rules and regulations as it may deem necessary or proper for the management and use of the parks, monuments and memorials under its jurisdiction, and the violation of any of the rules and regulations authorized by this section shall be a misdemeanor and punishable accordingly.

\* \* \* \* \*

**592.071 Rules and regulations for certain parks.**—The board may adopt and enforce such rules and regulations as may be necessary for the protection, utilization, development, occupancy, and use of said parks, and consistent with existing laws and with the purpose, or purposes, for which said areas were acquired, designated, and dedicated, and when such rules and regulations shall have been adopted they shall have the force and effect of law.

In *Hanna v. Sunrise Recreation, Fla.*, 94 So.2d 597, where a private corporation under its lease charged a fee for the use of the golf course, the Supreme Court of Florida said:

The fact that charges will be made for the use of the facilities and that a private corporation will profit therefrom are not controlling. The Board is authorized by statute, Sec. 592.072, F.S.1955, F.S.A., to make charges to the public who use the facilities of the park. And we have held that the fact that a private corporation or individual will incidentally profit from the transaction does not in itself defeat a public purpose. . . .

Numerous text book expressions lead to the conclusion that the property of the state and its agencies is generally not subject to municipal regulation and direction. (49 Am. Jur. States, Territories and Dependencies 269, 13 Am. Jur. 2d Buildings 271) In many instances, the validity of statutes providing for or relating to maintenance of parks in municipalities has been upheld on the theory that such action involves the exercise of a governmental function. (39 Am. Jur. Parks, Squares, and Playgrounds 806, § 6, footnote 14.) On two occasions the Attorney General of Florida gave advice that the operation of state parks is governmental. (1939 Biennial Report of the Attorney General, 356; and 1941 Biennial Report of the Attorney General, 578.)



Of similar import is the problem in the case of *Lowell v. City of Boston* (Mass.) 79 N.E.2d 713. The court held that the state held title to the Boston Common and Public Garden in a corporate capacity as an agency of government as distinguished from a private or a proprietary capacity, even though an underground garage was leased for private operation. The court did not view the leasing as a "purely commercial venture for its own profit." In this regard the court said, at p. 729:

... The objection rests upon a mistaken view of the statute. The garage is an incident in a legislative plan designed to abate a public nuisance arising from serious traffic congestion due to the greatly increased use of motor vehicles and their parking in the public ways of the city. The garage is a method employed to accomplish the primary purpose of the statute. Statutes reasonably designed to eliminate a public nuisance have been sustained, although some particular benefit to private individuals has resulted....

The state and its agencies, furthermore, are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of the act may be, unless the intention to include them is clearly manifest. (82 C.J.S. p. 554, § 317.)

In the case of *Aviation Services v. Board of Adjustment of the Township of Hanover, et al.*, 119 A.2d 761, it is stated:

... [W]here the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption that such immunity was intended in absence of express statutory language to the contrary.

Application of the principle advanced in *Aviation Services, supra*, is inherent in a subsequent decision of the New Jersey Supreme Court. In the case of *Mammoth Consolidated Water Co.*, 47 N.J. 251, 220 A.2d 189 (1966), the Supreme Court sustained the general right of the state board of public utility commissioners to authorize a water company to construct and operate a water storage tank, a pumping station and related fixtures and appurtenances at a location in a township in spite of prohibitions in a zoning ordinance of the township. The court considered the statutory exemption fully sufficient to authorize the board to so act.

In this connection it was determined in the case of *Hill v. Collingswood* (1952), 9 N. J. 369, 88 A.2d 506 (cited in annotation in 61 ALR2d 970, *et seq.*), that a lessee in a county park who operated a year-round milk bar and provided tennis, boating and bicycling facilities for public hire, was not governed by the borough's zoning ordinance, because the county park commission was authorized by statute to adopt rules for the park, thereby excluding municipal control by use zoning.

The rationale of *Hill, supra*, is given expression with reference to state and federal relationships in the case of *Arizona v. California*, 283 U. S. 423, 51 Sup. Ct. 522.

In the case of *Nichols Engineering & Research Corp. v. State ex rel. Knight, et al.*, Fla., 59 So.2d 874, the court held that a location for an incinerator that the City of Miami proposed to build was not objectionable on the ground that the area was not properly zoned. In this connection the court said:

The only objection raised by appellees is that the property on which the incinerator is to be located has not been adequately zoned for that purpose. In our view the steps taken by the city, including Chapter 27728, completely overcome any objection raised by appellees. . . .

In conclusion, it is observed that the operation, development, preservation and maintenance of Jonathan Dickinson State Park are, by law, made the responsibility of the Florida Board of Parks and Historic Memorials and as such constitutes a paramount authority, there being no language of the sections above stated which admits any doubt of the existence of such responsibility. Any interpretation contained in AGO 053-284 of Oct. 22, 1953, Biennial Report of the Attorney General, 1953-1954, p. 570, inconsistent herewith is hereby overruled.

069-44—July 2, 1969

### OSTEOPATHIC PHYSICIANS

#### AUTHORITY TO COMPLETE VARIOUS MEDICAL FORMS IN CONNECTION WITH INSURANCE CLAIMS AND APPLICATIONS FOR ADMISSION TO SUNLAND TRAINING CENTERS

To: Dr. M. E. Meck, Executive Secretary, Board of Osteopathic Medical Examiners, New Smyrna Beach

#### QUESTIONS:

1. Are osteopathic physicians permitted, under Ch. 393, F. S., to make the medical reports for admission of patients to Sunland training centers?

2. May the initials "M.D.," on various medical forms relating to insurance claims, insurance examinations, and other physical examinations, be construed as relating to osteopaths as well as medical doctors?

The first question is answered in the negative. Section 393.021, F. S., which deals with admission to Sunland training centers, states in part:

(2) . . . [The] application shall contain a report by a qualified physician of good professional standing and a graduate of a school of medicine *recognized by the American medical association*, stating that the applicant has been examined by said physician and the results of said examination, a diagnosis and history of the applicant's mental and physical condition. (Emphasis supplied.)

This language is clear, and the only conclusion that can be reached is that an osteopath, not being a graduate of a school of medicine recognized by the American medical association, is not authorized to make reports relative to admission to Sunland training centers.

It is interesting to note that § 394.201, F. S., which deals with admission to Florida state hospitals, provides for written certification by two licensed physicians that they are of the opinion that the person is mentally ill. Section 394.191, F. S., provides further clarification by defining "physician" as consisting of "An individual licensed, or otherwise authorized, to practice medicine or osteopathy under chapter 458 or chapter 459."

Therefore, although an osteopath is deemed qualified for the purpose of admission to the psychiatric centers at Florida state hospitals, he may not make admission applications at Sunland training centers.

Your second question is answered in the affirmative. Section 459.07, F. S., controls your second inquiry. The section states in part that:

(2) Physicians and surgeons of the osteopathic school of medicine are to have all rights and to be of equal rank and grade as the physicians and surgeons of the other three schools of medicine designated as allopathic, homeopathic and eclectic.

However, § 459.13, F. S., reveals that although osteopaths are of equal rank, there are duties, responsibilities and limits:

**459.13 Privileges and obligations of osteopaths.—**

(1) Osteopathic physicians and surgeons shall observe and be subject to all state and municipal regulations relative to reporting births and deaths and all matters pertaining to the public health, with equal rights and obligations as physicians of other schools of medicine, and such reports shall be accepted by the officers of the departments to which the same are made.

(2) Osteopathic physicians and surgeons licensed under this chapter shall have the same rights as physicians and surgeons of other schools of medicine with respect to the treatment of cases or holding of offices in public institutions.

(3) *It is the intent and purpose of this chapter to grant to osteopathic physicians and surgeons the right to practice as taught and practiced in the standard colleges of osteopathy. (Emphasis supplied.)*

The legislative intent, as expressed, would seem to allow osteopaths to fill out the medical forms as alluded to in your letter unless there is some reason why their training might be deemed insufficient in a particular instance. In short, if an osteopath has been trained to deal with the matters contained in the form, the designation by the initials "M.D." would not prevent an osteopath from acting.

069-45—July 3, 1969

**PUBLIC FUNDS**

**INVESTMENT OF MUNICIPAL FUNDS—CONSTRUCTION  
OF § § 167.74(1), AND 665.43 [§ 665.321], F. S.**

To: J. Hardin Peterson, Jr., City Attorney Pension Board, Lakeland

**QUESTION:**

Is the pension board of the City of Lakeland prohibited from investing more than 10% of the total amount of the pension fund in savings and loan association accounts and savings accounts of banks, in view of the provision of the enabling act, Ch. 30917, Laws of Florida, 1955, as amended by § 1(c), Ch. 63-1518, Laws of Florida, for investment in "securities in which public funds may be invested under authority of the law. . . ."

Although § 215.47(2), F. S., limits investment of funds of state agencies in such accounts to 10% of any particular fund available for investment, I conclude that this provision is by its own terms inapplicable to the municipal fund about which you inquire. The controlling law is instead that set out in § § 665.43 [§ 665.321] and 167.74(1), F. S., which

authorize investment of municipal funds in such accounts "to the extent that the same are insured by the federal government or an instrumentality thereof." The question presented is therefore answered in the negative.

069-46—July 3, 1969

#### TAXATION

##### HOMESTEAD EXEMPTION FOR VENDEE UNDER CONTRACT NOT RECORDED ON JANUARY 1

To: *E. David Tyner, Attorney for Tax Assessor, Zephyrhills*

#### QUESTION:

Must a bona fide contract to purchase real property, properly executed prior to the year in which homestead exemption is sought, be recorded before January 1 of the year in which the homestead exemption is sought?

The exemption granted by § 7, Art. X, State Const., 1885 controlling 1969 taxes *Ammerman v. Markham*, Fla. 1969, 222 So.2d 423, is applicable to "Every person who has the legal title or beneficial title in equity to real property. . . ." Pursuant to expressed legislative power to prescribe "reasonable laws regulating the manner of establishing the right to said exemption," § 192.13[§ 196.041], F. S., provides that vendees in possession under contracts to purchase "shall be deemed to have legal or beneficial title" *when such instruments are recorded*.

Although property must qualify for exemption under Florida law on January 1 of the year for which exemption is claimed, § 192.141[§ 196.061], F. S., I conclude that circumstances have not altered the conclusion stated on the above question by AGO Biennial Report of the Attorney General, 1939, p. 448:

. . . [T]he right held by the purchaser comes within the meaning of the language of the Constitution of "legal title or beneficial title in equity." Since the purchaser under such contracts has the title within the meaning of the Constitutional Homestead Amendment, I am of the opinion that the fact that these contracts have not been recorded would not affect the purchaser's right to this exemption provided, of course, that all other essential requirements of the amendment are met.

This conclusion is substantiated by decisions which (1) recognize a taxable equitable title in such vendees without reference to recording, *Bancroft Inv. Corp. v. City of Jacksonville*, Fla. 1946, 27 So.2d 162, 169; (2) invalidate legislative restriction of the constitutional exemption, *Sparkman v. State*, Fla. 1952, 58 So.2d 431; and (3) find that recording generally does not affect validity or effectiveness of a transaction, *Black v. Skinner Mfg. Co.*, Fla. 1907, 53 Fla. 1090, 43 So. 919, possession serving also in some instances as notice equivalent to record, *Bauman v. Peacock*, Fla. 1955, 80 So.2d 365.

Your question is therefore answered in the negative.



069-47—July 3, 1969  
(See also AGO 069-51)

**ASSESSMENT AND COLLECTION OF TAXES**

**COMMISSIONS FOR ASSESSMENT AND COLLECTION OF  
SCHOOL TAXES, ART. IX, § 4, STATE CONST.**

To: *Ralph Harris, Clerk, Board of County Commissioners, Vero Beach*

**QUESTION:**

Are commissions of the tax collector and assessor for school taxes to be paid from the county general fund or by the school board?

I conclude that school taxes levied under Art. IX, § 4 of the 1968 State Const. are district taxes controlled by the provisions of § 193.65(4)[§ 192.091(4)], F. S., that commissions for assessing and collecting such taxes "shall be . . . paid by the governing board or commission having charge of the financial obligations of such district. . . ."

Article IX, § 4, State Const. 1968, states:

- (a) Each county shall constitute a school district . . . .
- (b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes . . . .

The 1968 State Const. eliminates the former provision of Art. XII, § 8, for a county school tax and the provision of § 10 for district school taxes upon legislative "division of any county or counties into convenient school districts." Although the specific language of § 193.65(4)[§ 192.091(4)], F. S., for payment by the board of public instruction of commissions on special school district taxes may be in part inconsistent or inapplicable under present constitutional provisions, I find that the remaining provisions of the statute above quoted clearly require payment of commissions by the school board from school district funds. See *Coppedge v. State*, 99 Fla. 358, 127 So. 319, holding that the expense of collecting district school taxes under the former constitution was not a county purpose so as to be payable out of county funds.

The commissions in question are therefore not payable from the county general fund.

069-48—July 3, 1969

**ASSISTANT STATE ATTORNEYS**

**EMPLOYMENT ON FULL-TIME BASIS—ADDITIONAL LEGAL  
PRACTICE FOR COMPENSATION PROHIBITED**

To: *J. H. Guerry, Executive Director, Judicial Administrative Commission, Tallahassee*

**QUESTION:**

Is an assistant state attorney who serves in a full-time capacity as such eligible for employment in a municipal court or county court with compensation being paid by either a city or county in addition to his state salary?

Section 5(b) of Ch. 69-100, Laws of Florida (§ 282.01(7)(b), F. S.), being the 1969 appropriations act, authorizes maximum salaries for assistant state attorneys who serve on a "full-time" basis, with a lower maximum being provided for "part-time" assistant state attorneys. Section 7 of said act (§ 282.01(9), F. S.) defines "full-time" service as follows:

Section 7. Full-time service as contemplated in sections 5 and 6 of this act shall mean that the person occupying the position of state attorney, assistant state attorney, or public defender shall not otherwise engage in the practice of law or accept any compensation in addition to their salary for any legal service.

In the light of these statutory provisions, it is clear that a "full-time" assistant state attorney may not engage in the practice of law otherwise than as assistant state attorney and may not accept any compensation for any legal service in addition to his salary as assistant state attorney. It is equally clear that if a "full-time" assistant state attorney should engage in the practice of law in a municipal court or county court, he would no longer qualify as a "full-time" assistant state attorney and would no longer be eligible to receive the higher salary authorized by the above-mentioned § 5(b) of Ch. 69-100, Laws of Florida (§ 282.01(7)(b), F. S.). Your question is answered in the negative.

069-49—July 8, 1969

#### PUBLIC OFFICERS

#### CONSTITUTIONAL PROHIBITION AGAINST HOLDING MORE THAN ONE STATE, COUNTY, OR MUNICIPAL OFFICE NOT APPLICABLE TO SPECIAL DISTRICT OFFICES

To: *John W. Burton, Attorney, Hospital District Board, Wauchula*

#### QUESTION:

Can a person legally remain simultaneously an elected member of the city council and an appointed member of the hospital district board of Hardee County?

It must initially be pointed out that city council membership and membership on the hospital district board of Hardee County would clearly constitute the holding of two offices as opposed to mere employments. The question, therefore, is whether the two offices held are among those enumerated in Art. II, § 5(a), State Const. of 1968, prohibiting dual office holding. The constitutional provision states in its pertinent part:

... No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, constitutional convention, or statutory body having only advisory powers.

The provision, it is to be noted, is confined to offices held under state, county, or municipal governments. The question specifically before us then is whether the hospital district board on which the person serves, is under one of these enumerated governments.

The Supreme Court of Florida has on numerous occasions distinguished state and county offices from those held under special districts created by the legislature. In construing two other constitutional provisions applying to "state and county officers" Art. III, § 27, and "state, county and municipal officers" Art. XVI, § 14, the Supreme Court in each instance held that this language of the 1885 State Const. could not be construed to include special district officers. *State v. Ocean Shore Improvement District*, 116 Fla. 784, 156 So. 433; *State v. Reardon*, 144 Fla. 755, 154 So. 868; *State ex rel. Smith v. Hamilton, et al.*, 166 So. 742. In the latter case the Court stated:

... Section 14, article 16 of the Constitution, requiring state, county, and municipal officers to continue in office after the expiration of their respective terms until their successors are duly qualified, is not applicable to district officers. ...

In *Town of Palm Beach v. City of West Palm Beach*, 55 So.2d 566, the Court ruled:

... The officers of this district are neither state nor county officers. They are district officers and it is not necessary that they be elected by the people or appointed by the Governor. ...

In view of the above rulings by the Florida Court that express mention of state, county, or municipal offices in the State Const. cannot, without more, be extended to include special district offices, it is my opinion that your question must be answered in the affirmative. The language of Art. II, § 5(a), State Const., 1968 prohibiting the holding of more than one office under the "state and the counties and municipalities" cannot be extended to include special districts such as the hospital district of Hardee County.

I am aware of no other constitutional or statutory provision which would prohibit the simultaneous holding of the two offices described.

069-50—July 8, 1969

#### PUBLIC OFFICERS AND EMPLOYEES

##### ELIGIBILITY FOR GROUP INSURANCE; WORKMEN'S COMPENSATION—CONSTRUCTION OF §§ 112.081 AND 440.02, F. S.

To: John H. Dewell, County Attorney, Bartow

#### QUESTION:

Does § 4, Ch. 67-301, Laws of Florida (§ 112.081, F. S.), authorize or permit the bringing of circuit judges within the purview and operation of Ch. 440, F. S., the Workmen's Compensation Law of Florida?

Section 440.02, F. S. defines employment, as used in Ch. 440, F. S., as including "Employment by the state and all political subdivisions thereof and all public and quasi-public corporations therein ..." However, it is further provided in said section that the term employment "shall not include service performed by or as ... officers elected at the polls."

Circuit judges in Florida have been elective officers since the general election in 1948. Circuit judges, therefore, are "officers elected at the

polls" within the purview and intention of the above provision contained in § 440.02, F. S., and are, therefore, not within the purview and intention of the Workmen's Compensation Law, unless § 4, Ch. 67-301, Laws of Florida (§ 112.081, F. S.), mentioned in your letter of June 16, 1969, brings them within the purview and intention of said Ch. 440, F. S., which section is as follows:

All circuit judges who, on July 1, 1967, are participating in an insurance program for county employees are hereby deemed to be county employees for the purpose of such participation even though there is no actual cash salary supplement received from the county.

It appears from Chs. 20078, 1939, 27821, 1951, 28464, 1953, and 61-2707, all Laws of Florida, that laws applicable to Polk County providing group insurance for public employees of that county were similar to §§ 112.08-112.14, F. S., which were derived from Ch. 20852, Laws of Florida, 1941.

Said § 4, Ch. 67-301, Laws of Florida (§ 112.081, F. S.), may well have had for its purpose the validation of circuit judge membership in group insurance for public employees, under said §§ 112.08, 112.09-112.14, F. S., which may have originated on the theory that circuit judges serve a dual state and county purpose. *State v. Lee*, 119 Fla. 745, 160 So. 886. This construction of § 4, Ch. 67-301 (§ 112.081, F. S.), seems more reasonable than a construction of said statute as intending the authorization of workmen's compensation for circuit judges in apparent violation of the provision in § 440.02, F. S., that the term employment "shall not include service performed by or as . . . officers elected at the polls." The authority granted by said § 4, Ch. 67-301 (§ 112.081, F. S.), is merely authority to participate in an insurance program for county employees under §§ 112.08, 112.09-112.14, F. S., and has no connection with workmen's compensation under Ch. 440, F. S. Section 4, Ch. 67-301, Laws of Florida (§ 112.081, F. S.), was intended only to extend the insurance provided for in §§ 112.08, 112.09-112.14, F. S., to circuit judges residing in counties having such insurance.

I do not pass upon the question of whether or not the including of said § 4, in Ch. 67-301, Laws of Florida (§ 112.081, F. S.), an appropriations act (§ 282.0101, F. S.), affected the validity of the said act by reason of § 30, Art. III, of the State Const. of 1885, under which it was enacted, or whether such a defect, if it exists, was cured by republication of the section in the Florida Statutes, 1969.

069-51—July 24, 1969  
(See AGO 069-47)

#### ASSESSMENT AND COLLECTION OF TAXES FOR SCHOOL PURPOSES

#### ARTICLE XII, § 10, STATE CONST. OF 1885, AS AMENDED; ART. IX, § 4, STATE CONST., 1968

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

#### QUESTION:

Are the school taxes which are to be collected beginning in November 1969, assessed and collected under §§ 8 and 10 of Art. XII, State Const. of 1885?



My opinion 069-47 [this publication] found that school taxes under Art. IX, § 4, of the 1968 State Const., are district taxes for assessment and collection of which commissions would not be payable from county general funds under § 193.65(4) [§ 192.091], F. S.

The present question should be answered in the affirmative based on the decision in *Ammerman v. Markham*, Fla. 1969, 222 So.2d 423, that the Fla. Const., 1968 became effective on January 7, 1969, and therefore does not apply to 1969 taxes which are determined under law and facts existing on January 1, 1969. Sections 192.04, 193.11 [§ § 192.021, 193.071], F. S., and cases noted in AGO 068-110, Biennial Report of the Attorney General, 1967-1968, Dec. 20, 1968.

To the extent, therefore, that 1969 taxes are levied under Art. XII, § 8, of the former State Const., they are "a county and not a school tax" *Moreland v. Volusia County*, Fla. 1950, 48 So.2d 151 for purposes of determining payment of commissions under existing statutes, *supra*. See also § 237.18, F. S. Attorney General's Opinion 069-47 [this publication] is accordingly qualified by limitation of its conclusion to school district taxes which may in the future be levied under Art. IX, § 4, of the State Const. of 1968.

069-52—July 25, 1969

#### ASSISTANT STATE ATTORNEYS

##### APPOINTMENT—COMPENSATION—RESIDENCE REQUIREMENTS

To: *Charles T. Carlton, State Attorney, Fort Pierce*

##### QUESTIONS:

1. Is there any 1969 Statute which authorizes a state attorney to appoint an assistant or assistants, to be compensated by state funds, in addition to those authorized by pre-1969 Statutes?
2. If the answer to question 1 is in the affirmative, is there any residence requirement which pertains to such additional assistant or assistants?

##### AS TO QUESTION 1:

Section 27.19, F. S., 1967, specified the number of assistant state attorneys for each of the then existing nineteen judicial circuits, except that none was provided for the sixteenth circuit. Sections 27.321, 27.322 and 27.323, F. S., 1967, made the same provision for assistants for the ninth, eighteenth and nineteenth circuits, respectively, as did said § 27.19. Also, § 27.30, F. S., 1967, dealt with the number of assistants for the fifth circuit.

The 1969 Legislature enacted § 3, Ch. 69-212, Laws of Florida, which repealed § § 27.19, 27.321, 27.322 and 27.323, and § 4 which amended § 27.25(1), F. S., 1967, provides as follows:

The state attorney of each judicial circuit is hereby authorized to employ and establish, up to the maximum salary provided for[,] assistant state attorneys, investigators, and clerical, secretarial, and other personnel, who shall be paid from funds appropriated for that purpose.

Section 27.25(1), F. S., 1967, provided that:

The state attorney of each judicial circuit is hereby authorized to employ clerical, secretarial, or other personnel, the salaries of which shall be paid from funds appropriated for that purpose.

I construe § 27.25, F. S., as amended by said § 4 of Ch. 69-212, Laws of Florida, to express a legislative intent to empower each state attorney to employ as many assistant state attorneys, to be paid from state funds, as the amount of money appropriated for his use will permit. This construction is bolstered by the fact that § 3 of said chapter repealed §§ 27.19, 27.30, 27.321, 27.322 and 27.323, F. S., which were the only statutes specifying the number of assistants that state attorneys might have.

However, the same 1969 Legislature enacted Ch. 69-220, Laws of Florida, which divided the twelfth judicial circuit into the twelfth and twentieth circuits and which also amended § 27.19, F. S., despite the fact that Ch. 69-212, Laws of Florida, repealed it. Section 27.19, F. S., 1967, provided six assistants for the twelfth circuit and the only change made in that section by Ch. 69-220 was to reduce the number of assistants for the twelfth circuit to three and to authorize three for the new twentieth circuit.

It thus appears that we have a head-on, irreconcilable collision between Ch. 69-212, Laws of Florida, which repealed § 27.19, F. S., and Ch. 69-220, Laws of Florida, which amended it. Manifestly, both of these chapters cannot control as to the number of assistant state attorneys paid from state funds. I think that Ch. 69-212 must be given controlling effect.

Senate Bill 1229 became Ch. 69-212, Laws of Florida, and, after having passed the Senate, it passed the House on June 6, 1969. House Bill 653 became Ch. 69-220, Laws of Florida, and, after passing the House, it passed the Senate on June 6, 1969. Both bills went to the governor on June 13, 1969. Both became law without the governor's approval on June 29, 1969, and both were filed in the Office of the Secretary of State on that date. Therefore, it cannot be said that either was enacted after the other and we cannot apply the rule that when two statutes are so repugnant to each other that they cannot be reconciled, then the one last enacted will prevail.

Senate Bill 1229 (Ch. 69-212, Laws of Florida) provided that it should take effect on July 1, 1969. House Bill 653 (Ch. 69-220, Laws of Florida) provided that it should take effect upon becoming a law, and it became a law on June 29, 1969. Therefore, we apply the rule of statutory construction set forth in 82 C.J.S. 835, Statutes, § 367b, as follows:

*It is a general rule that where statutes passed at the same session are irreconcilably inconsistent, the latest in point of time will prevail. In this connection it has been held that, as between inconsistent statutes approved on the same day, that which takes effect last will prevail . . . (Emphasis supplied.)*

I think that this rule of construction is applicable even though the two chapters were never approved by the governor, since the fact that they both became laws without his approval had the same legal effect as though he had approved them, that is to say, they became laws just as effectively as if he had approved them.

Consequently, since Ch. 69-212, Laws of Florida, became effective later than Ch. 69-220, Laws of Florida, I conclude that Ch. 69-212 prevails as to the point under discussion. I am strengthened in this conclusion by certain provisions of Ch. 69-100, Laws of Florida, the 1969 Appropriations Act. Section 8 of said act (§ 282.01(10), F. S.) provides as follows:

Section 8. Notwithstanding the provisions of Chapter 27 and section 282.051(3)(a), F. S., the state attorneys and the public defenders shall determine the number of authorized positions to be paid from their respective appropriations.

This evidences a clear legislative intent that state attorneys shall determine the number of their assistants who are to be paid from their appropriations.

In keeping with the legislative intent thus manifested, the legislature, by enacting said Ch. 69-100, Laws of Florida, appropriated funds for the state attorneys of most of our judicial circuits substantially in excess of those recommended to it by the budget commission. For example, the budget commission recommended \$86,279 for the state attorney of the second judicial circuit for the fiscal year 1969-1970, and the legislature appropriated \$142,500 for his use during said fiscal year. For further example, the budget commission recommended \$93,330 for the state attorney of the eighth circuit during the fiscal year 1969-1970, and the legislature appropriated \$142,500 for his use during that fiscal year. For still further example, the budget commission recommended \$71,427 for the state attorney of the fourteenth circuit for the fiscal year 1969-1970, and the legislature appropriated \$90,000 for his use during said fiscal year. The fact that the legislature thus appropriated for most of the state attorneys substantially more money than was recommended by the budget commission shows that the legislature was aware that most state attorneys desperately need more funds in order to adequately cope with the ever-increasing volume and complexity of their work, and § 8 of said Ch. 69-100, Laws of Florida (§ 282.01(10), F. S.) shows that the legislature meant to leave it up to each state attorney to employ such assistants and other personnel, to be paid from state funds, as will be of the most assistance to him, without limitation as to number except that he must stay within his appropriation.

It is true that Ch. 69-100, Laws of Florida, was enacted into law on a date prior to the enactment of the conflicting Ch. 69-220, Laws of Florida. (Chapter 69-100 passed both houses on May 30, 1969, and became a law without the governor's approval on June 18, 1969, while Ch. 69-220 cleared the legislature on June 6, 1969, and became a law without the governor's approval on June 29, 1969.) It is also true that in *Provident Life & Accident Insurance Company v. Mathers*, 26 So.2d 814, the Sup. Ct. of Fla. ruled that when two irreconcilably inconsistent statutes are enacted at the same session of the legislature, the one last enacted will control. Under this ruling, if there were no Ch. 69-212, Laws of Florida, and if the only 1969 Statutes on point were Ch. 69-100 and Ch. 69-220, then Ch. 69-220, which was enacted later than Ch. 69-100, would prevail to the extent of the conflict between them, with the result that the number of assistant state attorneys for the several circuits would be specified by amended § 27.19 instead of being left up to the several state attorneys to determine, consistent with the amounts of their appropriations. Nevertheless, I think that Ch. 69-100, Laws of Florida, is to be taken into consideration in determining the legislative intent and that it buttresses my conclusion that Ch. 69-212,

Laws of Florida, controls to the exclusion of Ch. 69-220, Laws of Florida, to the extent of the conflict as to the number of assistant state attorneys who may be employed.

My conclusion is that each state attorney is authorized to employ as many assistant state attorneys, with their compensation payable from state funds, as the money appropriated for his use during the 1969-1970 fiscal year will permit, provided the budget submitted by him for said fiscal year contains provision for the assistants so employed and provided such budget has been approved. If his budget does not contain provision for any assistant or assistants he may wish to employ, he should submit an amended budget and procure its approval before employing such assistant or assistants.

#### AS TO QUESTION 2:

Section 27.20, F. S., 1967, provided that, with stated exceptions "... [T]he state attorney and an assistant state attorney shall not reside in the same county . . ." but that section was repealed by Ch. 69-212, Laws of Florida, which, as above stated, became effective on July 1, 1969. Section 27.323, F. S., 1967, relating to the nineteenth judicial circuit, provided that "... The assistant state attorney of the nineteenth judicial circuit shall not reside in the same county as the state attorney." [B]ut that section was also repealed by Ch. 69-212, Laws of Florida.

I find no statute now in effect that would forbid a state attorney and his assistants to reside in such county or counties of their circuit as they might choose.

069-53—July 25, 1969

#### COUNTY FUNDS

##### COUNTY GENERAL FUND—SPECIAL FUNDS—LIMITATION ON DISBURSEMENT

To: James W. Vance, Assistant City Attorney, West Palm Beach

#### QUESTION:

Is a county road and bridge fund established pursuant to § 336.59, F. S., a general county fund within the meaning of § 145.12(3), F. S., which would permit a transfer of excess fees received by the tax collector to be transferred to said road and bridge fund?

Section 145.12(3), F. S., pertinent to your request, has been amended by Senate Bill 1213(ch. 69-346, Laws of Florida) which became law without the governor's approval, to read as follows:

... [E]ach county officer shall pay into the county general fund all money in excess of the sum to which he is entitled as annual salary under the provisions of this chapter. The board of county commissioners shall expend such of the excess fees as necessary for the purpose of equipping and maintaining the offices of the county fee officers. (Emphasis supplied.)

It is apparent from this language that excess fees can only be paid into the county general fund. This fund was established pursuant to Ch. 26874, Laws of Florida, 1951, as amended by Ch. 29615, Laws of Florida, 1955, which also provides for the road and bridge fund, fine



and forfeiture fund, capital outlay reserve fund, bond interest and sinking fund and special district operating fund, in implementation of a plan for county fiscal operations. The county general fund has been distinguished from the other county funds in *Harrell v. Woodberry*, 56 So. 297, 297-98: "...[T]his grouping does not constitute a general fund for all purposes, including those for which special levies are made; it yet remains a special fund for such purposes only as may be properly embraced therein." Cf. *State v. Smith*, 88 Fla. 151, 101 So. 350; also § 129.06(3), F. S.; and AGO 051-434, Nov. 29, 1951, Biennial Report of the Attorney General, 1951-1952, p. 239.

Your question is accordingly answered in the negative.

069-54—July 31, 1969

### COURT COSTS

#### CONSTRUCTION OF CH. 69-111, LAWS OF FLORIDA, ASSESSING SPECIAL COURT COSTS IN CONNECTION WITH CONVICTIONS FOR VIOLATIONS OF CERTAIN PENAL STATUTES

To: *James W. Vance, Assistant City Attorney, West Palm Beach*

#### QUESTIONS:

1. What is the effective date of Ch. 69-111, Laws of Florida?

2. When a person is convicted for the violation of a municipal ordinance and elects to serve time in lieu of paying his fine and court cost, is the municipality required to pay to the state treasury the sum of \$1.00 for court cost as provided for in Ch. 69-111, Laws of Florida?

3. Does the exception relating to conviction for violation of parking offenses include all nonmoving violations resulting from improper parking or is it related only to parking meter violations?

4. Is the \$1.00 court cost as provided for in Ch. 69-111, Laws of Florida, to be imposed in those cases in which a defendant has been convicted but the fine and sentence are withheld or suspended?

5. When a defendant is convicted of violating two or more municipal ordinances arising out of the same factual situation, is the \$1.00 court cost to be assessed in each case?

In answer to question one, House Bill 2273 was enacted into law as Ch. 69-111, Laws of Florida. It is a bill pertaining to the establishment and funding of a Florida police academy. Section 22 of this bill specifically provides that "This act shall take effect July 1, 1969." The bill was approved by the Governor on June 18, 1969 and filed in the office of Secretary of State on June 19, 1969. Therefore, the effective date of the provisions of Ch. 69-111 is July 1, 1969.

Your second question is answered in the negative inasmuch as § 14 of Ch. 69-111, Laws of Florida (§ 23.103, F. S.), specifically provides that "... all such costs collected by the ... courts shall be deposited in the state treasury to the credit of the general revenue fund .... (Emphasis supplied.) Therefore, if a defendant elects to serve time in lieu of paying his fine and court cost, there would be no collection made by the court. In the event the court imposes a mandatory jail sentence and

no fine is imposed, the court would still be required under the provisions of § 14 of Ch. 69-111 (§ 23.103, F. S.), to assess one dollar as a court cost. When the defendant fails to make the required payment of \$1.00 court cost or elects to serve a prescribed jail sentence in lieu of the \$1.00 court cost, there would be no collection, and a remittance to the state treasury in either of the above situations would not be required.

As to question three, under the provisions of § 14 of Ch. 69-111, Laws of Florida (§ 23.103, F. S.), the exemption from the assessment of \$1.00 court cost specifically covers those offenses relating to the parking of vehicles. Therefore, any offense, whether state, county, or municipal, that relates to the parking of vehicles, such as prohibited parking, restricted parking, improper parking, overtime parking, etc., is exempt from the payment of the \$1.00 court cost assessment.

As to question four, the provisions of § 14 of Ch. 69-111, Laws of Florida (§ 23.103, F. S.) specifically provide that "every court created by the constitution of Florida or by legislative act *shall* assess one dollar (\$1.00) as a court cost against every person convicted for violation of a state penal or criminal statute or convicted for violation of a municipal or county ordinance. . . ." (Emphasis supplied.) Therefore, it would appear that the court is required to assess a \$1.00 court cost against every person convicted of a state, county, or municipal ordinance regardless of the type of sentence that may or may not be imposed by the court.

Your fifth question is answered in the affirmative inasmuch as § 14, of Ch. 69-111, Laws of Florida (§ 23.103, F. S.), appears to require an assessment of \$1.00 court cost upon each conviction of a specific state, county, or municipal charged offense. Therefore, if there are multiple charges against the defendant arising out of the same or a continuing factual situation, the court would be required to assess the \$1.00 court cost for each specific offense in which the defendant is convicted. However, the use of multiple traffic offenses which are based upon the same factual situation should be used with great care and caution and not be used against an offender when the facts and circumstances would appear to warrant or justify the issuance of a violation for either careless or reckless driving.

069-55—July 31, 1969

#### FLORIDA POLICE ACADEMY

#### COLLECTION AND DISPOSITION OF COURT COSTS PURSUANT TO CH. 69-111, LAWS OF FLORIDA

To: *Edwin Baur, Clerk of Circuit Court, Quincy*

#### QUESTION:

1. Inasmuch as notice of the assessment of court cost has been omitted from the title of Ch. 69-111, Laws of Florida, is the bill constitutional?
2. Is it necessary for the court to orally pronounce the \$1.00 court cost as provided for in Ch. 69-111, Laws of Florida (§ 23.103, F. S.), or may the clerk of the court automatically enter the assessment of court cost in the court minutes?

3. When indigents are convicted and they are unable to pay the \$1.00 court cost as called for in Ch. 69-111, Laws of Florida (§ 23.103, F. S.), is the county required to make this payment to the state treasury?

4. Inasmuch as fines and court costs are normally collected by the court, court clerks, or the sheriff, who is responsible for making reports and deposits to the state treasury?

As to question one, it has been a long-standing policy of the Attorney General's Office to refrain from rendering opinions on the constitutionality of legislative acts, inasmuch as this is more properly a function of the judiciary. However, legislative acts are presumed valid until proved otherwise by way of an appropriate proceeding in a court of competent jurisdiction. See *Davis v. State*, 146 So.2d 892 and *Lund v. Mathas*, 145 So.2d 871.

As to question two, your attention is directed to the provisions of § 939.01, F. S., which provide that "In all cases of conviction for crime the costs of prosecution shall be included and entered up in the judgment rendered against the convicted person." In the case of *Lindsey v. Dykes*, 175 So. 792, wherein the above Florida statute was under consideration, the court said, at page 793:

... It is true that the manual or physical act of assessing costs is in its nature clerical and may be performed by the clerk, but our statutes affecting the subject-matter clearly indicate that the amount of the costs must be adjudicated by the chancellor.

It therefore appears that taxation of cost should be determined by the court and orally announced at the time sentence is imposed.

Your third question is answered in the negative. Payment of the \$1.00 court cost as provided for in § 14 of Ch. 69-111, Laws of Florida (§ 23.103, F. S.), is only required to be forwarded to the state treasury in those instances in which it is collected. Therefore, when an indigent person, or any other person, is, after conviction, unable, or refuses, to pay the \$1.00 assessed court cost and serves time in lieu thereof, there would be no collection by the court and no requirement that a county make such payment to the state treasury.

The state cabinet sitting as the governing board of the Florida Bureau of Law Enforcement adopted, on July 15, 1969, pursuant to the authority contained in § 14 of Ch. 69-111, Laws of Florida (§ 23.103, F. S.), the following three rules pertaining to the deposit of the \$1.00 court cost with the state treasury, as required by the provisions of Ch. 69-111, Laws of Florida (§ 23.103, F. S.):

11-1.01 *Time of Deposit.* All courts or court officials collecting costs under the assessment provisions of Chapter 69-111, Laws of Florida, for establishment of a Florida Police Academy shall, not later than the fortieth day after the end of each calendar month, deposit all such costs collected during that calendar month in the State Treasury.

11-1.02 *Manner of Deposit.* All such deposits shall be made with the State Treasurer to the credit of the general revenue fund, Florida Police Academy, and shall be accompanied by a transmittal slip in such form as may be prescribed by the Florida Department of Law Enforcement.

11-1.03 *Form of Transmittal Slip.* The following form shall be used in submitting deposits to the State Treasurer with one copy to be retained by the submitting authority for audit purposes:

DATE \_\_\_\_\_

TO TREASURER OF THE STATE OF FLORIDA FOR DEPOSIT IN THE GENERAL REVENUE FUND, FLORIDA POLICE ACADEMY ACCOUNT:

Funds Remitted by: \_\_\_\_\_

Checks \$ \_\_\_\_\_

Cash \$ \_\_\_\_\_

Total Amount \$ \_\_\_\_\_

Collection period covered: \_\_\_\_\_

The above remittance is for:

Case No. \_\_\_\_\_ to Case No. \_\_\_\_\_

Total number of cases covered by remittance: \_\_\_\_\_

Other information as appropriate: \_\_\_\_\_

By: \_\_\_\_\_

It therefore appears that any court, court clerk, or sheriff collecting the \$1.00 court cost as provided for in Ch. 69-111, Laws of Florida, is required to make a report and remittance of such collection, and your fourth question is answered accordingly.

069-56—July 31, 1969

#### ADMINISTRATIVE PROCEDURE ACT

#### APPLICATION OF § 120.09, F. S., IN CONNECTION WITH REPLACEMENT OF A DISQUALIFIED DISTRICT SCHOOL BOARD MEMBER

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

#### QUESTION:

If school district board members, under § 4, Art. IX, of the State Const. of 1968, are for any cause or reason disqualified, within the purview and intention of § 120.09, F. S., from performing the functions required of them under said section, in a particular case, should substitute or replacement members be selected in accordance with § 120.09(1) and (2), F. S.?

Proceedings for disqualifying interested or disqualified judges of courts in Florida have existed at least since the enactment of Ch. 373, Laws of Florida, 1851, which provided for the substitution of other judges for disqualified judges. A type of disqualification and substitution of judges seems to have existed at common law (13 A.L.R. 1310; 30 Am. Jur. 2d 61, § 97).



Section 120.09, F. S., provides for the disqualification and substitution for disqualified persons within the purview, intention, and operation of said § 120.09. This section appears to relate to and regulate two classifications of disqualified persons. Section 120.09(1), F. S., provides as follows:

Any member of a commission elected by the people of the state and authorized by the statutes to exercise judicial powers may be disqualified, either voluntarily or involuntarily, from serving in a particular investigation, inquiry, hearing, trial, appeal, matter or thing on the same grounds, in the same manner and to the same extent as circuit judges may be disqualified from acting in a judicial capacity. In the event a commissioner is disqualified as aforesaid the governor shall appoint a circuit judge to serve temporarily in such pending matter in lieu of the disqualified commissioner. . . . (The State Insurance Commissioner and the Commissioner of Agriculture of Florida, are excluded from the operation of said subsection.)

Section 120.09(2), F. S., provides as follows:

Any member of a commission, authority, administrative body or governmental agency existing under the laws of the state *may be disqualified, either voluntarily or involuntarily, for bias, prejudice, interest or other causes, to serve in a particular investigation, inquiry, hearing, trial, appeal, matter or thing.* If the disqualified member holds his membership by appointment the appointing power shall appoint a substitute to serve temporarily in such pending matter in lieu of the disqualified member. If the disqualified member is an elected official and is not authorized by the statutes to exercise judicial powers the governor shall appoint a substitute to serve temporarily in such pending matter in lieu of such disqualified member. Provided, however, the provisions of this section shall not apply to the insurance commissioner and treasurer and the commissioner of agriculture. (Emphasis supplied.)

Section 120.09(1), F. S., seems to relate to persons elected by the people of the state and authorized by the statutes to exercise judicial powers. Mention is made in both said subsections of persons "exercising judicial powers," which poses the question of what is judicial power as used in said subsections. Black's law dictionary defines the term as, "the authority exercised by that department of government which is charged with declaration of what law is and its construction; the authority vested in courts and judges, as distinguished from the executive and legislative power." It is also, the "power to decide and pronounce a judgment and carry it into effect between persons and parties." In re Manufacturer's Freight Forwarding Company, 292 N.W. 678, 680.

Although manner of executing law is necessarily within an administrative officer's reasonable discretion, exercise thereof does not constitute exercise of "judicial powers." People v. J. O. Beekman & Co., 347 Ill. 92, 179 N.E. 435, text 437. The term "Judicial Power" seems to be used in several senses, to wit: General, Broad, Technical, etc., (50 C.J.S. *Judicial* 568-571). A Quasi-Judicial Power has been defined as "a power, not necessarily judicial, but one in the discharge of which there is involved an exercise of judgment and discretion; more specifically, a power conferred or imposed on an officer or a board involving the exercise of discretion, judicial in its nature, in connection with, and as

incidental to, the administration of matters assigned to such officer or board." (50 C.J.S. *Judicial* 564). Quasi-Judicial functions have been said to be those "which lie midway between judicial and ministerial ones." (50 C.J.S. *Judicial* 564).

School boards, under the statutes of Florida, as well as school districts under Art. XII, § 10, of the State Const. of 1885, were deemed subordinate school officers, *State v. Board of Public Instruction*, 98 Fla. 66, 123 So. 540, and *State v. Blake*, 110 Fla. 178, 148 So. 566. Article IX, § 4 of the State Const. of 1968 has replaced county schools and county school districts with school districts consisting of one or more counties, which differ little legally from said county schools and county school districts under the State Const. of 1885, as amended.

I am of the opinion that the "Judicial Powers" mentioned in § 120.09(1), F. S., have reference to courts or state agencies performing the functions of courts in some instances, and not to commissions, authorities, administrative bodies, and governmental agencies exercising administrative functions, which may extend to the exercise of quasi-judicial functions; however, quasi-judicial functions would not usually be subject to classification as the exercise of *judicial powers*, so as to bring them under said § 120.09(1).

This answers the above-stated question, and substitute or replacement members should be selected and appointed in accordance with § 120.09(2), F. S., unless it should appear to the governor that experienced judicial officers should be deemed necessary for a proper disposition of the case, which necessity should appear from the governor's order making the selection and appointment.

069-57—July 31, 1969

## TAXATION

### AGRICULTURAL ZONING, FILING OF RETURN; DUTY OF TAX ASSESSOR

To: *Granville H. Crabtree, Jr., State Representative, Sarasota*

#### QUESTIONS:

1. Is a person who does not file an application for agricultural zoning, pursuant to § 193.201[§ 193.461], F. S., on or before April 1 of a given year entitled to receive the agricultural classification and the favored tax treatment of agricultural lands?

2. Must the tax assessor review each parcel of land for which an application for agricultural zoning has been filed, regardless of whether or not a return has been filed, in order to determine whether or not the land is being used for a bona fide agricultural purpose?

Section 193.201(3)[§ 193.461(3)], F. S., provides in part:

No lands shall be zoned as agricultural lands unless a return is made as required by law . . . . All lands which are used primarily for bona fide agricultural purposes shall be zoned agricultural. . . .

It is further stated in § 193.201(6)[§ 193.461(6)], F. S., "The county tax assessor in assessing such lands so zoned . . . shall consider no factors other than those relative to such use." (Emphasis supplied.)

The statute clearly requires, as a prerequisite to the zoning of lands as agricultural, that a return be made, "as required by law," which should require compliance with such provisions as § 193.12[§ 193.203], F. S. In AGO 064-90, Biennial Report of the Attorney General, July 14, 1964, p. 385, however, the conclusion was reached that zoning by the board of county commissioners under or pursuant to § 193.201[§ 193.461], F. S., is not a condition precedent to assessment under and pursuant to § 193.11(3)[§ 193.071(3)], F. S., which requires that "All lands being used for agricultural purposes shall be assessed as agricultural lands . . . ."

A taxpayer may therefore resort to administrative remedies to secure a proper assessment on the ground of agricultural use without having filed a timely return to obtain an agricultural zoning of his land. As stated in *Stiles v. Brown*, 177 So.2d 672, *cert. discharged* 182 So.2d 612:

The taxpayer has the right to expect public officials to do their duty, but he owes a duty to himself and to the public to cooperate in the processes by which his tax burden is determined. He should file a tax return. But failure to file a return does not preclude his appearing before the Board of Equalization to protest an excessive assessment.

The court further held that "it is the duty of a landowner desiring the beneficial treatment of § 193.11(3)[§ 193.071(3)], F. S., to make known to the taxing authorities his claim of utilizing the subject property for agricultural purposes, either by making a timely return of his property or by exhausting his administrative remedies, and that in the absence of a landowner so doing, an assessment which does not give effect to the statute is valid. See also *Brown v. St. Joe Paper Co.*, 178 So.2d 606. I conclude, with respect to the first question above stated, that the absence of a timely return will sustain rejection of agricultural zoning under § 193.201[§ 193.461], F. S., but will not forfeit the right to a proper assessment of lands as agricultural if administrative remedies are properly pursued thereafter.

As to question two, the opinion in *Stiles v. Brown*, *supra*, appears to be in point:

... [I]t is the bona fides of the utilization by the landowner that makes the land eligible for the benefits of the statute, and the physical condition and appearance of the subject property is not of itself controlling. To require the tax assessor to interrogate each owner of land and determine whether or not he is utilizing the taxable land for bona fide agricultural purposes as defined by said statute would impose an intolerable burden upon this official and local government. . . .

In the absence of notice or knowledge of such bona fide use, the *Stiles*' opinion indicates an assessor is not required to make an independent determination on this point.

069-58—August 1, 1969

### CRIMINAL PROCEDURE

#### INDICTMENT AND INFORMATION—OFFENSES CHARGED, "CARELESS DRIVING"

To: Jeffords D. Miller, Assistant State Attorney, Kissimmee

#### QUESTION:

Can a person plead guilty to reckless driving or careless driving as a lesser included offense of driving while intoxicated after said defendant has been administered the breathalyzer examination and a presumptive reading of intoxication has been registered?

I note that the question refers to the offense of "careless driving," but I find no offense against state law which is referred to by statute as "careless driving." Neither reckless driving nor any other offense is a lesser degree of driving while intoxicated. Also, neither reckless driving nor any other offense is included within a charge of driving while intoxicated unless the charging document alleges all of the essential elements of the lesser offense.

This principle of law is dealt with in 41 Am. Jur. 2d 1074, *Indictments and Informations*, § 313, as follows:

It is a well-established general rule that when an indictment charges an offense which includes within it another, lesser offense, or one of a lower degree, the defendant, although acquitted of the higher offense, may be convicted of the lesser, or he may be convicted of the major offense without regard to the minor one. This rule is embodied in the statutes in many jurisdictions.

The statement of the general rule necessarily implies that the lesser crime must be included in the higher crime with which the accused is specifically charged, and that *the averment of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser, in order to sustain a conviction of the latter offense.* . . . (Emphasis supplied.)

Likewise, 42 C.J.S. 1297, *Indictments and Informations*, § 275, states:

While it is not necessary to make a specific charge of all the offenses included in the charge for which the indictment is drawn, nevertheless *a conviction cannot be had of a crime as included in the offense specifically charged unless the indictment in describing the major offense contains all the essential averments of the lesser, or the greater offense necessarily includes all the essential ingredients of the lesser.* . . . (Emphasis supplied.)

The application of this principle of law is demonstrated by the opinion of the Sup. Ct. of Fla. in *Lindsey v. State*, 43 So. 87. Lindsey was indicted for assault with intent to commit murder in the first degree and was convicted of assault with intent to commit manslaughter. On appeal, he assigned as error the refusal of the trial court to give a requested instruction on aggravated assault. In approving the refusal to give this charge, the Supreme Court said that the jury was not au-



thorized to find Lindsey guilty of aggravated assault because the indictment did not allege an essential element of that offense, viz., that the assault was committed with a deadly weapon. We quote from the Court's opinion as to this point:

Examining the indictment in the case before us, we find that it does not charge that the assault was made with a deadly weapon, and therefore the essential ingredient to a charge of aggravated assault, a deadly weapon, is entirely lacking and was not included in the greater offense charged, *and the jury was not authorized to find the defendant guilty of an aggravated assault. . . .* (Emphasis supplied.)

It is appropriate to observe at this point that when a charging document charges driving while intoxicated, but does not allege all of the essential elements of reckless driving, a court is no more authorized to accept a plea of guilty of reckless driving than the jury was authorized to find Lindsey guilty of aggravated assault when the indictment against him did not allege one of the essential elements of that offense, viz., the use of a deadly weapon; that is to say, a court has no authority at all to accept such a plea under such a charging document. Also, see Florida Supreme Court's discussion of Offenses Which May Be Included on p. 383 of its opinion in *Brown v. State*, 206 So.2d 377.

Section 317.201, F. S., denounces the offense which is commonly referred to as driving while intoxicated. The two essential elements of said offense are: that the defendant be under the influence of alcoholic beverages to the extent that his normal faculties are impaired and that he drive or be in the actual physical custody of a vehicle.

Section 317.211, F. S., which proscribes reckless driving is not violated unless the defendant drives a vehicle with willful or wanton disregard for the safety of persons or property.

When a count of a charging document alleges only the essential elements of driving while intoxicated, an application of the above-stated principle of law requires a negative answer to your question. There can be no lawful conviction of any offense other than driving while intoxicated under a count of a charging document for driving while intoxicated unless such count also alleges all of the essential elements of the other offense. Incidentally, I consider that it would be improper for one count of a charging document to charge driving while intoxicated and also to allege the essential elements of reckless driving or some other offense.

The fact that a test given to a defendant indicates that he was intoxicated is of no importance in deciding the question presented by you. It is the allegations of the charging document which govern, not the weight of the proof that the defendant was intoxicated.

069-59—August 1, 1969

DEPARTMENT OF AGRICULTURE AND CONSUMER  
SERVICES

FLORIDA EGG COMMISSION ABOLISHED—DUTIES OF  
DEPARTMENT IN COLLECTING  
ACCRUED TAXES, ETC.

To: Doyle Conner, Commissioner, Department of Agriculture and Consumer Services, Tallahassee

## QUESTIONS:

1. Should the Department of Agriculture and Consumer Services continue to receive reports and collect excise taxes on eggs as established by § 504.08, F. S., after July 1, 1969?
2. Do the penalties provided in § 504.13, F. S., apply after July 1, 1969?
3. Under provisions of § 504.09, F. S., is an egg dealer required to keep and make available for one year after repeal complete and accurate records of eggs delivered by him?
4. If the penalties referred to in question two apply after July 1, 1969, whose duty is it to collect the penalties and delinquent taxes?

The first question is answered in the negative. Section 40 of the Governmental Reorganization Act (Ch. 69-106, Laws of Florida) sets the effective date of the Act at July 1, 1969. Since under § 32(13) of the act, the egg levy under former § 504.08, F. S., is abolished, no further taxes under that section will accrue after July 1, 1969. However, as will be seen by the answers to the other questions raised by your letter, you will still be responsible for collecting any taxes that accrued under the former § 504.08, F. S., prior to July 1, 1969.

Your second question is also answered in the negative. Section 504.13, F. S., provides various penalties for egg dealers or handlers who fail to pay the prescribed fee. The law in Florida regarding the effect of a penalty provision in a statute subsequently repealed was settled in the case of *Pensacola & A. R. Co. v. State*, 45 Fla. 86, 33 So. 985 (1903), where the court stated, at p. 986:

... This suit, though in form a civil one at law, was for the recovery of a sum that was clearly penal in its character. Indeed, the section of the statute under which it was brought characterizes it as a "penalty" to be recovered at the suit of the state. The law seems to be quite clearly settled that in actions of a penal character, depending upon a statute, the repeal of the statute pending an appeal will deprive the appellate court of any power to render a judgment by which this penalty may be enforced, and that the effect of a repealing statute is to obliterate the statute repealed as completely as if it had never been enacted, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded whilst it was an existing law, and that an action cannot be considered as concluded while an appeal therein is pending before an appellate court having jurisdiction to review it. ...

The position that in the absence of a saving clause, the repeal of a statute acts as a remission and operates to remove any remedy formerly provided is also enunciated in the cases of *Gewant v. Florida Real Estate Commission*, 166 So.2d 230 (3rd Dist. Ct. of App., 1964), and *General Capital Corporation v. Tel. Service Co.*, 212 So.2d 369 (2nd Dist. Ct. of App., 1968). In light of the foregoing Florida decisions, the penalty provisions of § 504.13, F. S., may not be enforced.

Although § 504.13, F. S., has been repealed, the rule is clearly set forth in the case of *Lee v. Walgreen Drug Stores*, 151 Fla. 648, 10 So.2d 314 (1942), that the repeal of a taxing statute does not deprive the state of the right to collect taxes already accrued. Therefore, the provisions of § 504.13, F. S., are enforceable as to the collection of taxes that accrued before July 1, 1969, but not as to penalties.

Your third question is answered in the affirmative. Section 504.09, F. S., provides that egg dealers or handlers shall keep records for one year. In light of the answer to your second question that taxes accrued before July 1, 1969, are collectible, it follows that the records should be kept in order to determine if a dealer or handler is in fact delinquent in his taxes. Therefore, records of sales made prior to July 1, 1969, must be kept for a period of one year.

In response to your fourth question, the Department of Agriculture and Consumer Services is responsible for collecting any delinquent taxes. Under § 14(3) of the Governmental Reorganization Act (§ 20.14(3), F. S.), all functions of the Department of Agriculture are transferred to the new Department of Agriculture and Consumer Services. Section 504.12, F. S., provided for the former Department of Agriculture to collect the taxes levied under Ch. 504, F. S. Therefore, since, as has been shown above, taxes accrued before July 1, 1969, are collectible despite the repeal of Ch. 504, your office is responsible for their collection.

069-60—August 4, 1969

#### TAXATION

##### REFUND OF TAXES ERRONEOUSLY COLLECTED PURSUANT TO § 193.40[§ 195.081], F. S.

To: *Fred O. Dickinson, State Comptroller, Tallahassee*

#### QUESTION:

Must Palm Beach County pay the total refunds of erroneously collected real property ad valorem taxes when such taxes have already been distributed to the school board and other taxing districts and special districts within the county?

Section 193.40[§ 195.081], F. S., authorizes the department of revenue to consider and pass upon application for refunds of taxes, and states that the board of county commissioners "shall comply with the order of the department" by providing in the county budget for the following year for the payment of such refunds, and the board may authorize tax levies to provide the fund with which to make the refund so ordered. There appears to be no authority for limiting the scope of this provision, which prescribes refund procedure for taxes "assessed on the county tax rolls" for all the various purposes for which such taxes are assessed.

Attorney General's Opinion 064-22, Feb. 20, 1964, Biennial Report of the Attorney General, 1963-1964, p. 278, refers to the general rule "that refunds of taxes must be made under and pursuant to statutes, and that such refunds may be made only when authorized by statute and then in the manner provided by the statute. (84 C.J.S. *Taxation* 1263 § 631)." The opinion further notes that when a tax refund is ordered pursuant to § 193.40[§ 195.081], F. S., the refund should be paid from an appropriation to be made in the next fiscal year, but concludes that if funds are available from budgets for contingencies then payment from such funds would be permissible. If no fund is available in any current budget for refunds, provision should be made by the county for payment in its budget for the following year, under the terms of the controlling law. The statute effectively classifies expenditures for such refunds as a county purpose without regard to the original distribution of the funds erroneously collected.

069-61—August 4, 1969

### CRIMINAL PROCEDURE

#### APPOINTMENT OF PUBLIC DEFENDER IN FIRST DEGREE MURDER PROSECUTION WHEN CHANGE OF VENUE GRANTED

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

#### QUESTION:

When a first degree murder indictment has been returned against a defendant in one judicial circuit, but venue has been changed to another judicial circuit, is the governor authorized to assign the public defender of the first-mentioned circuit to the last-mentioned circuit for the purpose of representing said defendant there?

I find no provision of law which specifically authorizes the governor to assign the public defender of one circuit to another circuit, and in my opinion you have no authority to make such an assignment except under the circumstances hereinafter discussed.

Section 27.51(1), F. S., makes it the duty of the public defender to represent any person who is determined to be insolvent and who is charged with any felony, including a capital felony. Upon the change of venue mentioned by you, I think that the duty of representing such a defendant becomes that of the public defender of the judicial circuit to which venue is changed. However, § 27.51(1) also provides that nothing therein contained shall prevent the trial court from appointing private counsel in capital cases as provided in § 909.21[§ 925.035], F. S., which provides for the appointment of counsel for an insolvent defendant in a capital case and for the allowance of compensation to such counsel, to be paid by the county in which the crime was committed.

Consequently, it is not imperative that the public defender of the circuit in which the defendant in question was indicted be assigned to the circuit to which the venue was changed in order for the defendant to have counsel to represent him, since he can be represented by the public defender of the latter circuit or by counsel appointed by the circuit court of that circuit.

However, in the highly unlikely event that the circuit court of the circuit to which venue was changed should enter an order disqualifying the public defender of that circuit from representing the defendant, and should be unable to find competent private counsel to appoint under § 909.21[§ 925.035], F. S., then, upon these facts being made known to you by said court, you would have the authority to assign to the circuit to which venue has been changed the public defender of any other circuit. This would be so because Art. IV, § 1, State Const., makes it the duty of the governor to "... take care that the laws be faithfully executed ..." and because the defendant would be unrepresented in the absence of such an assignment. In this connection, I note that in Advisory Opinion to Governor, 10 So.2d 926, the Supreme Court of Florida advised Governor Holland that, even though no statute specifically authorized him to assign the county solicitor of the criminal court of record of one county to prosecute cases in the criminal court of record of another county; yet, the governor had the authority to do so under a similar constitutional provision when the county solicitor of the criminal court of record of the county in which the cases were



pending had been disqualified by the order of that court and when the judge of that court had been unable to find a competent attorney willing to accept appointment as acting county solicitor for the purpose of prosecuting said cases. The governing statute, § 32.17, F. S., authorized the court to appoint an attorney as acting county solicitor only with the consent of the attorney so appointed. However, I do not understand that it is necessary for a circuit court to have the consent of an attorney before appointing him under § 909.21[§ 925.035], F. S., to represent an insolvent defendant in a capital case.

My conclusion is that you are without authority to assign the public defender of one circuit to another circuit to represent a defendant there unless (1) such defendant has been adjudged insolvent, (2) an order has been entered disqualifying the public defender of the latter circuit, and (3) the circuit court of that circuit has been unable to find a competent private attorney to appoint under § 909.21[§ 925.035], F. S.

069-62—August 5, 1969

#### PUBLIC OFFICER

#### CONSTITUTIONAL PROHIBITION AGAINST HOLDING MORE THAN ONE STATE, COUNTY OR MUNICIPAL OFFICE—ART. II, § 5(a), AND ART. V, § 18, STATE CONST.

To: *Dave Caton, City Attorney, Pensacola*

#### QUESTION:

May a circuit judge serve as a member of the Pensacola-Escambia Governmental Center Authority?

Article II, § 5(a), of the State Const., provides in part:

... No person shall hold at the same time more than one office under the government of the state... except that... any officer may be a member of a... statutory body having *only* advisory powers. (Emphasis supplied.)

Article V, § 18 of the State Const., prohibits judges and justices from holding "... any office or position of profit ..."

While the members of the Pensacola-Escambia Governmental Center Authority may receive no remuneration, it does appear from the act which created the Authority, Ch. 69-1049, Laws of Florida, (HB 3030) that the members thereof do have more than mere advisory powers so as to exclude the members of the Authority from the exemption in Art. II, § 5 of the State Const., pertaining to members of statutory bodies having *only* advisory powers. This observation is based on the fact that the members of the Authority have power to condemn property, issue bonds, etc., which appear to be more than simply advisory powers.

In construing constitutional provisions it is not inappropriate to apply the generally accepted rules of statutory construction. See 6 Fla. Jur. 281, Constitutional Law, § 12, and State *ex rel.*, McKay v. Keller, 140 Fla. 346, 191 So. 542. While it is an accepted rule of statutory construction that a provision relating to a particular subject controls over a more general provision relating to the same subject, see Adams v. Culver, Fla., 111 So.2d 665, this office would be hesitant in this instance to suggest that the provisions of Art. II, § 5 of the State Const.,

were unequivocally inapplicable in this situation since Art. II, § 5 uses the phrase "... No person shall hold ..." which is an all-encompassing phrase that could be construed to apply to all other officers including judges.

Assuming for the moment that Art. II, § 5 of the State Const., has no application to judges, this office would be further troubled by the language in Art. V, § 18, State Const., which prohibits judges from holding "... any office or position of profit ..." (Emphasis supplied.) While it is apparent that membership on the Pensacola-Escambia Governmental Center Authority is not a position of profit, see Opinion of the Justices, Ala., 13 So.2d 674, and Opinion of the Justices, Ala., 217 So.2d 53, it would be difficult to say that it is not an office. Since the constitutional provision uses the term "office or position of profit" in the alternative, it would appear that the prohibition could apply to any office even though there were no remuneration for service in said office.

It should also be pointed out in passing for such effect as it might have in the future that the proposed amendment to Art. V, § 16, of the State Const., as reprinted in the July issue of *The Florida Bar Journal*, seems to delete the reference to holding two offices for judges and could, therefore, bring them within the prohibition of Art. II, § 5, State Const., if and when the amendment is adopted. In addition, both the present and proposed amendment to Art. V, § 18, State Const., require judges to devote full time to their judicial duties and while the initial responsibilities of the Authority might be carried out in evening meetings, there does appear to be the possibility that at such time as bond validation and condemnation proceedings begin, the Authority would be required to devote daytime hours to its responsibilities, thus making it impossible for a public official to devote full time to his official duties.

In light of these conclusions and the rule set out in the Advisory Opinion to the Governor, 76 Fla. 417, 79 So. 874, which holds that the acceptance of a second office automatically constitutes a vacation of the first, this office would be hesitant to suggest that a circuit judge accept a position on the Pensacola-Escambia Governmental Center Authority if the city offered to make the appointment as authorized by § 3(a) of Ch. 69-1049, Laws of Florida.

In closing, it should be pointed out that the parties involved could settle the question with a greater degree of finality without additional litigation by raising the question in the Authority's first condemnation case or bond validation proceeding.

069-63—August 7, 1969

#### COUNTY JUDGES

#### COMPENSATION—CONSTRUCTION OF CH. 44, F. S., AS AMENDED BY CH. 69-403, LAWS OF FLORIDA

To: *Monroe W. Treiman, Executive Secretary, Florida County Judges' Association, Brooksville*

#### QUESTIONS:

1. When does Ch. 69-403, Laws of Florida[§ § 44.12-44.16, F. S.], become effective?
2. Is the salary schedule set out in Ch. 69-403, Laws of Florida[§ 44.12, F. S.], applicable to county judges on the fee system for the entire year 1969?

3. If question 2 is answered in the affirmative, then should said judges deduct any amounts earlier received in 1969 for services rendered as coroner or judge of juvenile, small claims or county courts?

4. When does the salary schedule set out in § 44.12, F. S., become effective for judges operating under a budget?

5. In view of the definition of the word "salary" in § 44.16(3), F. S., may any county judge receive compensation in addition to that set out in the salary schedule contained in § 44.12, F. S., from a governmental agency for official services following the effective date of the amendment?

6. May county judges whose compensation is established by special act or general act of local application continue to be paid under said local or special acts in lieu of receiving compensation under Ch. 44, F. S.?

7. Is a judge entitled to retain as personal income gratuitous honorariums such as those received for the performance of marriage ceremonies?

8. What effect, if any, does Ch. 69-403, Laws of Florida, have on AGO 067-82 as to the retention of income received by judges for the performance of functions as a notary public?

#### AS TO QUESTION 1:

Chapter 69-403, Laws of Florida, provides in § 8 that "This act shall become effective immediately upon becoming law." The act became law without the governor's approval and was filed in the office of the Secretary of State on July 10, 1969. Accordingly, Ch. 69-403, Laws of Florida[§ § 44.12-44.16, F. S.], became effective July 10, 1969.

#### AS TO QUESTION 2:

The salary schedule set out in § 3, Ch. 69-403, Laws of Florida (§ 44.12, F. S.), is applicable to county judges on the fee system for the entire year 1969, and your second question is, therefore, answered in the affirmative. See § 44.16(1), F. S., as added by Ch. 69-403, defining compensation as "... the *annual salary* or net income . . ." (Emphasis supplied.) See also AGO's 058-57 and 061-159, Biennial Report of the Attorney General, Feb. 18, 1958, question 3.

#### AS TO QUESTION 3:

Section 44.16(3), F. S., as added by Ch. 69-403, Laws of Florida, defines the word salary as "... the total compensation to be received by the county judge from any source connected with the official duties of his office, whether as county judge, county court judge, coroner, juvenile judge, or judge of the small claims court, and whether such compensation has previously been paid by general, special or local act. . . ." Since the word salary is now defined by the statute just quoted to include the compensation received by a county judge for services as coroner, judge of the juvenile court, small claims court, and county court, and since the compensation of a fee officer is calculated on an annual basis as of Dec. 31, as discussed in the answer to question 1, paragraph 3 of AGO 058-57 *supra*, and as provided in § 44.13(1), F. S., as amended, it would appear that any amounts previously drawn or received in 1969 for service as coroner or judge of a juvenile court, small claims court, or county court should be properly adjusted so that the county judge's total annual compensation, when it is calculated as of Dec. 31, 1969, will not include any compensation in addition to the amount provided by Ch. 69-403.

## AS TO QUESTION 4:

Chapter 69-403, Laws of Florida, provides in § 8: "This act shall become effective immediately upon becoming law." Chapter 69-403 became law on July 10 as explained in answer to question 1 above. Accordingly, it would appear that for those judges receiving a guaranteed monthly income under a budget, the new salaries authorized in Ch. 69-403 would become effective July 10. See AGO 061-159, Oct. 3, 1961, Biennial Report of the Attorney General, 1961-1962, citing *State ex rel., Bayless v. Lee*, 156 Fla. 494, 23 So.2d 575.

## AS TO QUESTION 5:

Section 44.16(3), F. S., defines the word salary as

[T]he total compensation to be received by the county judge from any source connected with the official duties of his office, whether as county judge, county court judge, coroner, juvenile judge, or judge of the small claims court, and whether such compensation has previously been paid by general, special or local act. Any commission, fees, service fees, charges or additional compensation received by the judge for governmental services from state or county sources shall become a part of the income of the judge's office and shall be deposited in the office fund.

It is apparent from the language just quoted that it was the legislative intent that the county judge draw one single salary as scheduled in § 44.12, F. S., as added by Ch. 69-403, Laws of Florida, for all official duties connected with his office. Thus, § 44.12, F. S., as added by Ch. 69-403 would have the effect of superseding any special act authorizing salary supplements for county judges for additional services, including, but not limited to, service as coroner, juvenile judge, small claims court judge or judge of a statutory county court. Accordingly, your fifth question is answered in the negative.

## AS TO QUESTION 6:

Section 5 of Ch. 69-403, Laws of Florida, authorizes the continued effect of special acts by adding § 44.14, F. S., which provides:

This chapter shall not be construed to repeal, affect, or modify any local or special law or general law of local application enacted prior to or during the 1969 session of the legislature as to compensation of county judges or travel expenses. However, if any county judge's compensation prescribed herein is more than that provided in any local or special law, or general law of local application, this law shall control and be applicable. In the event any special or local law or general law of local application affecting the compensation of any county judge is declared invalid or ineffective, the salary of such county judge affected shall be the amount fixed herein.

It appears from the foregoing that Ch. 69-403 was not intended to repeal, affect or modify any local or special law providing compensation for county judges in lieu of that authorized in Ch. 44, F. S., as amended. Accordingly, where a greater salary than that authorized by Ch. 44, F. S., is provided in a special or local act, the county judge may be compensated under the provisions of the special act for services rendered as a county judge. Your sixth question is answered in the affirmative.

## AS TO QUESTION 7:

Salary, as defined in § 44.16(3), F. S., means "Any commission,



fees, service fees, charges or additional compensation received by the judge for governmental services from state or county sources..." (Emphasis supplied.) Since gratuities received for performing marriage ceremonies do not come to the judge from state or county sources it appears that they should not be considered as a part of the income of the office and thus may be retained as personal income to the judge in addition to the amount specified as annual salary authorized under § 44.12, F.S., as added by Ch. 69-403. Accordingly, your seventh question is answered in the affirmative.

#### AS TO QUESTION 8:

Attorney General's Opinion 067-82 relating to the retention of notary fees is only affected to the extent that § 44.16(3), F.S., as added by Ch. 69-403, Laws of Florida, now provides that "... Any commission, fees, service fees, charges or additional compensation received by the judge for governmental services from state or county sources shall become a part of the income of the judge's office and shall be deposited in the office fund." Thus, any notary fees received by a judge or his employees from a state or county source in performance of a governmental function would be considered income of the office regardless of who purchased the notary commission and AGO 067-82 is modified in that respect. As concluded in that opinion, where an agency such as a county judge's office purchases a notary commission for an employee and said services are performed as a governmental function, then the fees become income of the office, and in this respect AGO 067-82 is still correct.

069-64—August 8, 1969

#### EXECUTIVE CLEMENCY

##### EFFECT OF PARDON ON FINE ASSESSED PURSUANT TO FELONY CONVICTION

To: *Earl Rich, Clerk of Circuit Court, Sebring*

#### QUESTION:

If the Florida Board of Pardons has granted a convicted felon a full and complete pardon, thereby restoring his civil rights, is the pardonee entitled to repayment of a \$500 fine which he previously paid in lieu of a six months' jail sentence?

Under Art. IV, § 12 of the State Const., of 1885, which was in effect at the time of the issuance of the pardon in question, the Florida pardon board clearly had the power to "... remit fines and forfeitures..." This power has remained unchanged under the provisions of Art. IV, § 8(a), State Const. of 1968. The relevant language of the pardon in the instant case does not discuss remission of a fine, but does state that the individual is "... hereby granted a full and complete pardon of the above offense, thereby restoring to him full and complete civil rights." It is my opinion that the above language conveyed all clemency the pardon board is empowered to give, including the release of the pardonee from prison, if he were still in prison, and the relinquishment of the state's right to any uncollected or outstanding fines or forfeitures.

However, in this instance, you have advised me that the pardonee was convicted and sentenced to 6 months in jail or to pay a \$500 fine. The pardonee then posted a supersedeas bond and took an appeal in which his conviction was affirmed. He then elected to pay the fine, which money was given to the sheriff, who in turn paid the money into

the appropriate fund of the Highlands County treasury. I am further informed that the circuit court which originally imposed sentence has no further control over the moneys paid into the county treasury as a result of its sentence. Based on this factual situation, I am of the opinion that your question must be answered in the negative for the following reasons.

In the initial construction of Florida's pardon power, *In re Opinion of the Justices* (Fla. 1872), 14 Fla. 318, the Fla. Sup. Ct. stated:

When the pardon is full, it remits the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence[sic]. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights. It makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment.

Similar definitions of the pardon power have led to the general rule adopted by other states and federal courts that a pardonee has no right to recovery of fines once they have left the possession of the court or an officer thereof and once the money has been paid into the public treasury or if the rights of third persons have attached thereto. 26 A.L.R. 1523, 1536; 67 C.J.S. Pardons, § 11(4), p. 580; 39 Am. Jur., Pardon, Reprieve and Amnesty, § 61, p.556.

I see no reason why the above statement should not apply with equal force and effect in Florida. I expressly refrain from any opinion concerning the recovery of fines still in the possession of the court at the time the pardon is granted.

069-65—August 8, 1969

## TAXATION

### SALES TAX CREDITS AND REFUNDS UNDER § 212.17(2) AND (3), F. S.

To: J. Ed Straughn, Director of Revenue, Tallahassee

#### QUESTIONS:

1. Are tax credits or refunds authorized under § 212.17(2) and (3), F. S., controlled by § 215.26(2), F. S.?
2. If question 1 is answered in the affirmative, when does the period provided for in § 215.26(2), F. S., begin to run?

Section 215.26(2), F. S., is the general law controlling refunds from the state treasury of overpaid and erroneously paid taxes and of payments where no tax is due. Section 215.26(2) states: "Application for refunds as provided by this section shall be filed . . . within three years after the right to such refund shall have accrued . . ." (Emphasis supplied.)

Section 212.17(2) and (3), F. S., states specific provisions of the sales tax law with respect to credit or deferred payment sales that tax shall be due and payable as for a cash sale, but that a taxpayer "... may take credit or obtain a refund for the tax paid by him on the

unpaid balance due him when he repossesses . . . in the same manner as he may obtain a credit or a refund under subsection (1) of this section upon the return of purchases . . . may take credit in any return . . . for the tax paid . . . on accounts which *during the period covered by the current return* have been found to be worthless . . . ." (Emphasis supplied.)

#### AS TO QUESTION 1:

I find no language in § 212.17, F. S., which prevents application of the general nonclaim statute, § 215.26(2), F. S., and therefore conclude that its provisions control claims under § 212.17(2) and (3) for refunds, including credit allowances. Section 212.17(3) requires, in addition, that the credit allowed under its terms shall be claimed only for bad debts charged off " . . . during the period covered by the current return . . . ." Although the limitations of § 215.26(2) are restricted to " . . . refunds as provided by this section . . . ." it covers overpayment of any tax and would therefore encompass claims under other specific statutory provisions such as § 212.17 by which overpayment or right to refund may be defined.

#### AS TO QUESTION 2:

The time limitations of § 215.26(2), F. S., have been held, in the case of refunds for statutory invalidity, to run from the date of payment of taxes rather than adjudication of the invalidity. *State v. Gay*, Fla. 1949, 74 So.2d 560. The statutory language, however, is that the period shall apply " . . . after the right to such refund shall have accrued . . . ." Although § 212.17, F. S., might be construed to create rights to refund which do not accrue until the time of repossession or other determinative acts, I believe a consideration of the legislative history together with administrative construction of the law supports the conclusion that all claims under § 212.17, F. S., must be made within 36 months from the date of payment of the tax. Attorney General's Opinion 066-55. See also *State v. Kirk*, Fla. 1967, 204 So.2d 4, rejecting claim for refunds more than three years after payment of tax, prior to enactment of § 212.17(2) and (3), F. S. (Ch. 67-518, Laws of Florida, 1967).

The provision of § 212.17(2), F. S., is for credit or refund to a taxpayer " . . . in the same manner as he may obtain a credit or a refund under subsection (1) of this section upon the return of purchases. . . ." Section 212.17(1) provides for refund or reimbursement " . . . in the manner prescribed by the department . . . ." The department's regulations, which have in the past required application under subsection (1) within 36 months from date of payment of the tax to the state, are in accord with the above construction of the statutory prescription. Chapter 318, Volume III, Rules and Regulations of the State of Florida.

069-66—August 8, 1969

#### RACING COMMISSION

##### ISSUANCE OF RACING PERMITS OR OCCUPATIONAL LICENSE TO A PERSON CONVICTED OF A FELONY

To: *Judson A. Samuels, Attorney, Florida State Racing Commission,  
Miami*

#### QUESTION:

May the Florida State Racing Commission issue racing permits or occupational racing licenses to persons convicted of

a felony or other crimes enumerated in § 550.181, Florida Statutes.

Section 550.181, F. S., entitled "Certain persons prohibited from holding racing permits; suspension or revocation of permits," contains pertinent language as follows:

(1) On and after the first day of July, 1952, no person who shall have been convicted of a felony in the state, or under the laws of any other state, government or country of an offense which would be a felony if committed within this state, or who shall have been convicted of bookmaking in the state or elsewhere, or who is commonly known as a bookmaker and bears the general reputation of being a bookmaker, or who knowingly associates regularly with persons commonly known as bookmakers or criminals, shall hold any horse or dog racing permit or jai alai fronton permit in the state, or be a member of any association which holds such permit, or be an officer or director of any corporation which holds such a permit, or be an employee of the holder of any such permit in any capacity connected to any extent with the racing business or jai alai fronton business in the state.

It is thus apparent that your question must be answered in the negative as to four specific categories of individuals convicted of crimes mentioned in said statute:

1. Holders of a horse racing, dog racing, or jai alai fronton permit.
2. Members of any association which holds a horse racing, dog racing, or jai alai fronton permit.
3. Officers or directors of any corporation holding such a permit.
4. Employees of the holder of such a permit in any capacity connected to any extent with the racing business or jai alai fronton business in the state.

In this connection reference is made to AGO 054-20, Jan. 29, 1954, Biennial Report of the Attorney General 1953-1954, p. 536, and cases cited therein, rendered to the Florida State Racing Commission on Jan. 29, 1954, by one of my predecessors in office, the Hon. Richard W. Ervin.

The question remaining for decision concerns the power of the commission to issue occupational licenses to persons who have been convicted of a felony or offenses mentioned in § 550.181(1), F. S., but who do not fall within the above four categories. Examples of such persons include contractual concessionaires, owners, trainers, and jockeys. See § 550.10, F. S.

Pursuant to its rule-making authority, § 550.02(4), F. S., the commission has adopted Rule 305 A-1.03(13), which provides:

No person who shall have been convicted of a felony or bookmaking in the State, or under the laws of any other state, government, or country, of an offense which would be a felony if committed within this State in the last ten (10) years shall be issued an occupational license by the Commission. Any deviation from this rule shall be approved by the Commission.

An examination of the general statutes reflects no proscription against the application of such rule to persons not in the categories set forth in § 550.181(1), F. S. Moreover, I note that § 849.24(5), F. S., contains specific language as to the commission's reinstatement of



persons who have been ejected from a race track or jai alai fronton for bookmaking, thus indicating legislative intent to empower the commission to waive, in effect, such convictions. See also *Simmons v. Hanton*, 65 So.2d 42 (Fla. Sup. Ct. 1953) in which the Court upheld as reasonable a rule of the state racing commission which required persons actively participating in racing activities to furnish fingerprints and photographs for the commissioner's files. This rule was found to have been properly enacted within the scope of the commission's general rule-making authority under § 550.02(4), F. S. Again in *Wexler v. Ring*, 125 So.2d 883 (Fla. 3rd D.C.A., 1961), a ruling by the commission which brought a racehorse owner under the application of § 550.181, F. S., was upheld by the district court.

Accordingly, it is my opinion that after a hearing pursuant to Rule 305 A-1.03(13), the Florida State Racing Commission may, in its discretion, issue an occupational license to an individual convicted of a felony or bookmaking as provided therein, so long as said individual is not within the categories specifically prohibited by § 550.181(1), F. S.

069-67—August 11, 1969

### SALES TAX

#### TAX ON RENTALS OF REAL PROPERTY—CONSTRUCTION OF § 212.031, F. S.

To: *J. Ed Straughn, Director, Department of Revenue, Tallahassee*

#### QUESTION:

Is a transaction in which a business furnishes floor space and certain services such as display, delivery, wrapping, packaging, telephone, credit, collection, and accounting in return for a percentage of the gross sales of the person furnished the floor space and services a rental of real property within the scope of § 212.031, F. S.?

If the services furnished are incidental to the furnishing of the floor space, then the transaction is taxable under § 212.031, F. S. Such services would be appurtenant to the use of the premises and reasonably essential to the use and enjoyment of the premises contemplated by the parties. *S. S. Jacobs Co. v. Weyrick*, 164 So.2d 246 (Fla. App. 1st, 1964). The rental of space in the building comes within the statutory definition of real property as being any interest in the surface of real property, with exceptions not here applicable. (§ 212.02(6)(g), F. S.)

If the percentage of gross sales agreement covers only the cost of services, and floor space rental is paid separately, then this payment for services rendered would not be a rental of real property taxable under Ch. 212, F. S.

069-68—August 15, 1969

[The original answer to Question 2 was modified by AGO 069-136]

### COUNTY OFFICERS

#### COMPENSATION AS PROVIDED BY CH. 145, F. S., AS AMENDED BY CH. 69-346, LAWS OF FLORIDA

To: *Harold Mullendore, Clerk of the Circuit Court, Clearwater*

#### QUESTIONS:

1. When does Ch. 69-346, Laws of Florida, amending Ch. 145, F. S., become effective?

2. When do the salary increases provided for in Ch. 69-346, Laws of Florida, amending Ch. 145, F. S., take effect for fee officers and budget officers and when do the second year salary increases take effect?

3. Will officers such as county commissioners and supervisors of elections be allowed to retain compensation allowed by special act or otherwise for services rendered to port authorities, mosquito control districts, cities, etc.?

4. May county officers continue to retain reimbursement provided by special act for travel expenses?

At the outset it must be understood that adopted budgets by county commissions might be affected requiring review and possible adjustment.

#### AS TO QUESTION 1:

Section 12 of Ch. 69-346, Laws of Florida (§ 145.15, F. S.), provides: "This act shall take effect July 1, 1969...." The question occurs because Ch. 69-346 was not filed in the office of the Secretary of State until July 5, 1969, which was after the July 1 effective date prescribed in the law.

The only legal authority discussing a situation in which an act became law subsequent to the effective date prescribed therein appears to be that found in AGO 067-49, Aug. 10, 1967, Biennial Report of the Attorney General, 1967-1968, p. 78, dealing with Ch. 67-313, Laws of Florida, quoted with approval in AGO 068-9, Jan. 19, 1968, Biennial Report of the Attorney General, 1967-68, p. 174. In AGO 067-49, *supra*, it was concluded that the effective date provision was null and void and the act should become effective 60 days after the adjournment of the legislative session under the provisions of the former Art. III, § 18, which are now found in Art. III, § 9 of the 1968 State Const. That opinion dealt with a tax statute which was to be strictly construed in favor of the taxpayer and was, according to the opinion, a situation in which it seemed "clear that the Legislature did not propose retroactive operation of the statute."

The instant situation, however, deals with a salary law for public officials which is entitled to a more liberal construction. It is also an act which the legislature obviously intended to become operative on July 1 as evidenced by use of the July 1 date elsewhere within the act. In this regard see Ch. 69-346, § 7(2), (c), Laws of Florida, adding § 145.121, F. S., gearing salary decreases to July 1 and the remainder of the effective date provision found in § 12 of the act (§ 145.15, F. S.) which ties salary increases to the July 1 date established in § 11. 031(3), F. S.

Legislative intent "is the polarstar by which the courts [and this office] must be guided" in construing acts of the legislature (*Ervin v. Peninsular Telephone Co.*, Fla., 53 So.2d 647, *Smith v. Ryan*, Fla., 39 So.2d 281, and *Fla. State Racing Comm. v. McLaughlin*, Fla., 102 So.2d 574) and in this instance it appears to have been the obvious legislative intent that Ch. 69-346, Laws of Florida, become operative July 1, 1969. Your first question is answered accordingly.

AS TO QUESTION 2—The original answer to Question 2 was modified by AGO 069-136 to read as follows:

Salary increases for fee officers as provided for in Ch. 69-346, Laws of Florida, amending Ch. 145, F. S., take effect January 1, 1969. See AGO 058-57, Feb. 18, 1958, Biennial Report of the Attorney General, 1957-1958, p. 542, and AGO 061-159, Oct. 3, 1961, Biennial Report of the Attorney General, 1961-1962, p. 267, question 3. Salary increases for county officers operating on budgets take effect under the provisions of Ch. 145, F. S., as amended by Ch. 69-346, Laws of Florida, on July 1, the effective date of the act. See AGO 061-159 as mentioned above, citing *State ex rel. Bayless v. Lee*, 156 Fla. 494, 23 So.2d 575.

Salary increases for the second year for fee officers are to be based on 120% of what the officer received during the fiscal year Jan. 1, 1969, to Dec. 31, 1969, and will be increased annually thereafter in the same fashion until the salary authorized in Ch. 145, F. S., as amended is reached. See § 145.121(2)(b), F. S. For example:

|                                                                                                                                                  |          |
|--------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Salary January 1, 1968-Dec. 31, 1968                                                                                                             | \$9,000  |
| Ex officio personal income from<br>fees and commissions                                                                                          | 1,000    |
| Total 1968 compensation                                                                                                                          | \$10,000 |
|                                                                                                                                                  | X 120%   |
| Salary for Jan. 1-Dec. 31, 1969                                                                                                                  | \$12,000 |
| Ex officio personal income from<br>fees and commissions Jan. 1 to<br>June 30, 1969                                                               | 500      |
|                                                                                                                                                  | \$12,500 |
|                                                                                                                                                  | 120%     |
| Salary for Jan. 1-Dec. 31, 1970<br>and so forth each year thereafter<br>until the maximum allowed under<br>Ch. 145, F. S. as amended is reached. | \$15,000 |

Additional increased compensation for officers on a budget takes effect Oct. 1, 1969, and is 120% of the total compensation received during the fiscal year Oct. 1, 1968, to Sept. 30, 1969, and there will be increases annually thereafter in the same fashion until the salary authorized in Ch. 145, F. S., as amended, is reached. See § 145.121(2)(b), F. S.

For example, the salary for 1968-1969 would be calculated as follows:

(A)

For the period Oct. 1, 1968, to June 30, 1969, the officer would receive 9/12ths of the compensation authorized by Ch. 145, F. S. (1967), or applicable local, special or general law of limited application, plus the actual ex officio personal income earned from fees and commissions during the period Oct. 1, 1968 to June 30, 1969.

## (B)

From July 1, 1969 (the effective date of Ch. 69-346[Laws of Florida]) to September 30, 1969, the officer would receive 3/12ths of 120% of the total compensation to which the officer was entitled for the fiscal year ending September 30, 1968, including ex officio or contract personal income from fees and commissions.

The increased salary for a budget officer for the period Oct. 1, 1969, to Sept. 30, 1970, would be calculated as follows:

One hundred twenty per cent (120%) of the total compensation received during fiscal year ending Sept. 30, 1969.

In no event, however, is a fee or budget officer authorized to receive more than that allowed under Ch. 145, F. S., as amended by Ch. 69-346, Laws of Florida, and percentage increases stop when the maximum allowable compensation figure is reached unless the population of the county increases so as to place the officer in a higher salary bracket effective July 1, 1971, pursuant to § 11.031(3), F. S.

Officers whose salary exclusive of fees and commissions prior to July 1, 1969, exceeded the salary authorized in Ch. 145, F. S., as amended, receive compensation under § 145.121(2)(a), F. S., as follows:

Fee officers whose salary exclusive of fees was greater than the salary provided under Ch. 145, F. S., as amended, continue to receive the same salary but without fees until the expiration of their present term. For example:

|                                                                                 |          |
|---------------------------------------------------------------------------------|----------|
| 1968 Salary                                                                     | \$9,000  |
| Ex officio personal income from<br>fees and commissions                         | \$1,000  |
| Total 1968 Compensation                                                         | \$10,000 |
| 1969 Salary                                                                     | \$9,000  |
| Ex officio personal income from<br>fees and commissions Jan. 1-June 30,<br>1969 | 500      |
| Total Jan. 1-Dec. 31, 1969 Compensation                                         | \$9,500  |
| Total Jan. 1-Dec. 31, 1970 Compensation                                         | \$9,000  |

Compensation will thereafter remain constant until the end of the present term unless a greater salary is authorized as a result of a population increase which will then become effective July 1, 1971, pursuant to § 11.031(3), F. S.

Budget officers whose salary exclusive of fees was greater than the salary provided for in Ch. 145, F. S., as amended, continue to receive their present salary without extra fees or commissions until the expiration of their present term. For example, the compensation for 1968-1969 would be calculated as follows:

From Oct. 1, 1968 to June 30, 1969, the officer would receive 9/12ths of the compensation authorized by Ch. 145, F. S. (1967) plus all ex officio personal income actually received or earned (as appropriate) from fees and commissions.

Subsequent to July 1, 1969, the effective date of Ch. 69-346[Laws of Florida], the officer will receive monthly 1/12th of the salary authorized by Ch. 145, F. S. (1967),



without extra fees or commissions "until the expiration of his present term" unless the county experiences a population increase at which time the officer will receive an increase as provided in Ch. 145, F. S., as amended, effective July 1, 1971, pursuant to § 11.031(3), F. S.

Under § 145.121(2)(c), F. S., a fee or budget officer "... whose total compensation for the immediately preceding fiscal year under which the office operates, including fees, commissions, or other extra compensation, was in excess of the salary payable under this chapter shall continue to receive ..." the compensation authorized by Ch. 145, F. S. (1967), plus all ex officio fees and commissions until July 1, 1970, at which time the salary of both fee and budget officers in this classification shall be reduced to the figure stated in Ch. 145, F. S., as amended by Ch. 69-346, Laws of Florida. The salary shall remain the same thereafter unless and until it may be increased as a result of a population adjustment effective July 1, 1971, pursuant to § 11.031(3), F. S.

The above observations and illustrations provide the general formulas by which your second question is answered.

AS TO QUESTION 3:

Section 145.121(1), F. S., as added by Ch. 69-346, Laws of Florida, provides:

Other income to be income of the office; implementation of salary schedules.—

(1) Except for the salary receivable under this chapter, all fees, costs, salaries, commissions, extra compensation, or any other funds which are paid or payable to a county official or to his office ... by law or on account of any service (including service arising out of ex officio duties) performed by the official for any agency or instrumentality of the state or of any county or municipality in the state, or for any officer, board, district, authority or unit of state or local government, or for individuals, wherein any of the personnel or equipment or space of the office is employed shall be included as income of the office and shall not be retained by the county official as personal income.

Chapter 69-211, Laws of Florida, adding § 145.16, F. S., prohibits special legislation excepting county officials from the uniform pay plan adopted in Ch. 145, F. S., as amended, and prohibits special legislation pertaining to compensation for said county officials.

It appears from the above and foregoing that compensation, fees, commissions, or extra income received on account of services performed by officers such as county commissioners or supervisors of elections under the authority of valid (not repealed by § 145.13(2), F. S. (1967), § 145.131(1), F. S. (1969), or other competent authority) special acts, contracts or otherwise, should henceforth be considered income of the county and not retained by the official as personal income except reimbursement for travel and extra compensation authorized for chairmen of school boards and county commissions by special act which may be retained by the officer under the provisions of § 145.131(1), F. S., as amended by Ch. 69-346, Laws of Florida. Accordingly, except for the exclusion just mentioned, your third question is answered in the negative.

## AS TO QUESTION 4:

Section 145.131, F. S., as added by § 9 of Ch. 69-346, Laws of Florida, provides that:

(1) All local or special laws or general laws of local application enacted prior to July 1, 1969, which relate to compensation of county officials are repealed, *except laws pertaining to travel expenses of county officers, . . .* (Emphasis supplied.)

It appears from the above and foregoing exception that county officers who are authorized to receive reimbursement for travel expenses under the provisions of special acts may continue to draw such reimbursement. County officers may also continue to be reimbursed under the provisions of § 112.061, F. S., where authorized. Your fourth question is answered in the affirmative.

069-69—August 15, 1969

## TAXATION

TAXATION OF MUNICIPAL PROPERTY FOR BENEFIT OF  
UNINCORPORATED AREAS

To: *Harold Mullendore, Clerk of the Circuit Court, Clearwater*

## QUESTION:

May a county expend funds from the county general fund for improvements to sanitary sewers in unincorporated areas?

Article VIII, § 1(h), State Const. of 1968, provides:

**TAXES; LIMITATION.** Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas.

While it is a long established policy of this office, initiated by my predecessors and continued by me, to refrain from ruling on constitutional questions of this nature, this office would, out of an abundance of caution and in an effort to be of some assistance, informally suggest that there is a serious question involved in expending general tax funds collected from the owners of property in unincorporated and incorporated areas throughout the county for sanitary sewers which only serve the unincorporated areas of the county. Such an expenditure, in the absence of a showing that a county-wide benefit exists for all property owners in both incorporated and unincorporated areas, would appear to make the county commissioners vulnerable to a successful attack in the courts in light of the above-quoted provision of the State Const.

Trusting you will understand my position in this regard and find these observations helpful.

069-70—August 15, 1969

COMPENSATION OF ASSISTANT STATE  
ATTORNEYS AND PUBLIC DEFENDERS

SUPPLEMENTATION OF COMPENSATION PROVIDED BY § 5(b) OF  
CH. 69-100, LAWS OF FLORIDA, (§ 282.01(7)(b), F. S.)

To: *Wallace W. Henderson, Director, Division of Planning and Budgeting, Tallahassee*

QUESTION:

Are assistant state attorneys and public defenders who elect to serve full time entitled to receive any county, municipal or local salary supplementation in addition to the \$20,000 provided for in Ch. 69-100, § 5(b), Laws of Florida (§ 282.01(7)(b), F. S.), for assistant state attorneys, or the \$19,000 provided for in Ch. 69-100, § 6(a), Laws of Florida, for the public defenders?

Section 5(a)(1) of Ch. 69-100, Laws of Florida, (§ 282.01(7)(a)1., F. S.) (§ 282.01(8)(a), F. S.) the 1969 Appropriations Act, fixes the salaries for full-time state attorneys and concludes as follows:

... The state attorneys so serving full time shall not receive from any county or municipality any supplemental salary, except in the eleventh judicial circuit where the total salary shall not exceed \$33,000 per annum.

Section 5(b) of the same act fixes the salaries for full-time assistant state attorneys, but does not prohibit county or municipal supplements for them; it says nothing about such supplements.

Section 6(a) of said act fixes salaries for full-time public defenders but contains no proscription against county and municipal supplements for them; it is silent as to such supplements.

Section 7 of said act provides that:

Section 7. Full-time service as contemplated in §§ 5 and 6 of this act shall mean that the person occupying the position of state attorney, assistant state attorney, or public defender shall not otherwise engage in the practice of law or accept any compensation in addition to their salary for any legal service.

Section 27.53(1), F. S., contains the following provision:

... The state and *each county may expend moneys* in furtherance of the provisions of this act *for additional salary of the public defender* and assistant public defenders, and for the salaries and expenses of additional assistant public defenders, investigators, secretaries and other clerical help, and for other necessary expenses of operation and maintenance of the office. (Emphasis supplied.)

Also, at least one statute, Ch. 69-601, Laws of Florida, authorizes a municipal supplement to the state salary of a public defender.

There are a number of statutes which authorize county supplements for assistant state attorneys. For example, Ch. 61-583, Laws of Florida, provides for a county supplement to the state salary of an assistant state attorney of one of our judicial circuits.

Such statutes as the ones mentioned in the last three paragraphs, *supra*, clearly provide for supplements to the state salaries of public defenders and of some assistant state attorneys. None of said statutes were expressly repealed by §7, Ch. 69-100, Laws of Florida (§282.01(9), F.S.) and therefore they continue in effect unless they were impliedly repealed by said chapter. Although it would be possible to construe §7[§282.01(9), F.S.] standing alone, as forbidding supplements for full-time assistant state attorneys and full-time public defenders, I think that the better construction of said section, looking only at its face, would be to the effect that it does not forbid such supplements; and, for this reason and the reasons hereinafter discussed, I hold that §7[§282.01(9), F.S.] did not repeal by implication the above-mentioned statutes authorizing supplements and therefore places no ban on county or municipal supplements for full-time assistant state attorneys or full-time public defenders.

In *Dade County v. City of Miami*, 82 So. 354, the Sup. Ct. of Fla. said:

... There is no express repeal of one by the other, and it is well settled that repeals of one statute by another by implication are not favored. *Florida East Coast R. Co. v. Hazel*, 43 Fla. 263, 31 So. 272, 99 Am.St.Rep. 114; *Curry v. Lehman*, 55 Fla. 847, 47 So. 18.

In *State v. Gadsden Co.*, 58 So. 232, said Sup. Ct. said:

While statutes may be impliedly as well as expressly repealed, yet the enactment of a statute does not operate to repeal by implication prior statutes unless such is clearly the legislative intent....

In *State v. Simpson, et al.*, 114 So. 542, the said Sup. Ct. said:

This court in the *City of St. Petersburg et al. v. Pinellas Co. Power Co.*, 87 Fla. 315, 100 So. 509, say (sic):

The legal presumption is that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intent to do so. An interpretation leading to such a result should not be adopted unless it be inevitable. The rule of construction in such cases is that if the courts can by any fair, strict or liberal construction find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation, it is their duty to do so.

In *State Dept. of Public Welfare v. Galilean Children's Home*, 102 So.2d 388, the Dist. Ct. of App., 2nd Dist. said:

This is not in conflict with the general rule of legislative construction which presumes later statutes passed with the knowledge of prior existing laws, and favors a construction which gives each a field of operation rather than have one meaningless or repealed by implication. 50 Am.Jur., Statutes, Sections 354 and 362.

In *Curry v. Lehman*, 47 So. 18, the Sup. Ct. of Fla. said:

The intention of the Legislature, however, in enacting a law, is the law itself, and must be enforced, when ascertained, al-



though it may not be consistent with the strict letter of the statute. The court will not follow the letter of a statute when it leads away from the true intent and purposes of the Legislature and to conclusions inconsistent with the general purpose of the act.

Applying the principles thus enunciated, I conclude that § 7, of Ch. 69-100, Laws of Florida (§ 282.01(9), F. S.), did not impliedly repeal any statute authorizing counties or municipalities to supplement the state salaries of full-time assistant state attorneys or full-time public defenders. This conclusion is strengthened by a consideration of the matters hereinafter referred to.

Chapter 69-100, Laws of Florida, was passed as a Committee Substitute for S. B. 1192. When S. B. 1192 was originally introduced, § 4(a)(1) thereof prescribed salaries for full-time state attorneys and concluded with the following words: "... and the state attorneys so serving full-time shall not receive from any county or municipality any supplemental salary ..." and § 4(b) fixed the salaries of full-time, as well as part-time, assistant state attorneys and ended as follows: "... and no assistant state attorney shall receive from any county or municipality any supplemental salary ..." and § 5(a) fixed the salaries of full-time public defenders but did not mention supplements.

Section 6 of said original S. B. 1192 was exactly to the same effect as § 7 of Ch. 69-100, Laws of Florida (§ 282.01(9), F. S.).

Thus, it appears that original S. B. 1192 specifically forbade supplements for full-time state attorneys and for all assistant state attorneys but not for full-time public defenders. That the purpose of § 6 of said original bill was not to forbid supplements to state salaries is shown by the insertion of specific prohibitions of such supplements for full-time state attorneys and all assistant state attorneys in said § 4(a)(1) and 4(b).

The Committee Substitute for S. B. 1192, which became Ch. 69-100, Laws of Florida, followed the lead of said senate bill by prohibiting supplements for full-time state attorneys, with one exception, and by saying nothing about supplements for public defenders. However, said committee substitute did not go along with S. B. 1192 with respect to supplements for assistant state attorneys in that the committee substitute removed the ban on supplements for assistant state attorneys which S. B. 1192 contained.

If it had been the purpose of § 6 of original S. B. 1192, to the same effect as § 7 of Ch. 69-100, Laws of Florida (§ 282.01(9), F. S.), to forbid supplements for full-time state attorneys and assistant state attorneys, it would have been wholly unnecessary for § 4 thereof specifically to ban supplements for full-time state attorneys and for all assistant state attorneys, and the insertion of these specific prohibitions in said § 4 indicates that § 6 had no such purpose.

And why did the committee which drafted committee substitute for S. B. 1192, and the legislature which enacted it as Ch. 69-100, Laws of Florida, pointedly insert a specific prohibition against supplements for

all full-time state attorneys, except one, if said committee and the legislature considered that § 7 of Ch. 69-100 (§ 282.01(9), F. S.) prohibited such supplements? I do not think that either said committee or the legislature so considered said § 7 (§ 282.01(9), F. S.). I believe that said specific prohibition as to full-time state attorneys indicates that said committee and the legislature considered that said § 7 (§ 282.01(9), F. S.) did not forbid county or municipal supplements for state attorneys. And since this was apparently the legislative thinking as to state attorneys, it is reasonable to conclude that the legislature did not intend for said § 7 (§ 282.01(9), F. S.) to act as a prohibition against supplements for full-time assistant state attorneys or full-time public defenders.

In conclusion, my opinion is that § 7 of Ch. 69-100, Laws of Florida (§ 282.01(9), F. S.), means that full-time assistant state attorneys and public defenders, (as well as state attorneys), may not practice law otherwise than in their official capacities and may not receive compensation for any legal service except their state salaries and any supplemental salaries paid by counties or municipalities under statutory authority. Neither § 7 of Ch. 69-100 (§ 282.01(9), F. S.) nor any other statutory provision forbids the payment of county or municipal supplements to full-time assistant state attorneys or full-time public defenders. It is lawful for full-time assistant state attorneys and full-time public defenders to receive any county or municipal supplements authorized by statute.

069-71—August 19, 1969

#### TAXATION

##### SPECIAL DISTRICT MILLAGE—HILLSBOROUGH COUNTY HOSPITAL WELFARE BOARD—CONSTRUCTION OF ART. VII, § 9(b), STATE CONST.

To: T. Terrell Sessums, State Representative, Tampa

#### QUESTION:

Does the Hillsborough County hospital welfare board qualify as a special taxing district so as not to be within the limitation of 10 mills under Art. VII, § 9(b) of the 1968 State Constitution for all county purposes?

Article VII, § 9(b), State Const., provides:

Ad valorem taxes, exclusive of taxes levied for the payment of bonds . . . shall not be levied in excess of the following millages . . . for all county purposes, ten mills; for all municipal purposes, ten mills . . . and for special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

Article XII, § 15, State Const., provides:

Ad valorem taxing power vested by law in special districts existing when this revision becomes effective shall not be abrogated by Section 9(b) of Article VII herein, but such powers, except to the extent necessary to pay outstanding debts, may be restricted or withdrawn by law.

Chapter 63-1402, and amendments in Ch. 65-1677, both Laws of Florida, govern the hospital welfare board of Hillsborough County. These acts provide in part that upon resolutions fixing millages within prescribed limits, passed by the hospital board and reviewed by budgetary authorities, the board of county commissioners shall levy a tax for the hospital welfare board. Purposes for which these funds may be used under the act include establishment and operation of medical facilities and exercise of other broad public welfare functions by the governing board, composed of three elected members serving with the chairman of the board of county commissioners and the Tampa mayor as ex officio members.

Consideration of the detailed provisions of Chs. 63-1402 and 65-1677, Laws of Florida, indicates that in all functional respects the hospital welfare board of Hillsborough County is organized as a special taxing district under its elected governing board. Although Ch. 63-1402, in § 6 and 15D, Laws of Florida, refers to the board's exercise of a "public and essential governmental function" in performance of a "county purpose," it is clear that the board's functions under the terms of the act are also defined as district purposes. Provisions of the 1968 State Const. apparently do not alter former decisions that there exists "no constitutional inhibition against . . . making the boundaries of a special taxing district coextensive with the boundaries of a county," and "the power to determine what shall be the taxing district for any particular burden is purely a legislative power . . . except as it may be limited . . . by constitutional provisions." Volume 23, Fla. Laws & Prac., Taxation §§ 28 and 29. *Pinellas County v. Mosquito Control Dist.*, Fla. 1967, 194 So.2d 599.

I conclude therefore, for the reasons above stated, that the hospital welfare board of Hillsborough County is a special taxing district in which ad valorem taxing power was vested when the revised constitution became effective, independent of county tax millage. Such power, under the terms of Art. XII, § 15, State Const., is preserved until restricted by law and is not abrogated by the provisions of Art. VII, § 9(b), State Const., limiting special district tax millage to that "authorized by law approved by vote . . . ." The question first above stated is accordingly answered in the affirmative.

Although the constitutional millage limitations do not, for the reasons stated, presently affect the board, its taxing power does appear to be limited by the provisions of § 193.321[§ 200.071], F. S., et seq., stating:

... no aggregate ad valorem tax millage shall be levied against real and tangible personal property by counties and districts as herein defined in excess of ten mills on the dollar of assessed value, except for special benefits and debt service on obligations issued in connection therewith, and except for that millage authorized in Art. VII, § 9, of the state constitution.

Article VII, § 9(b), *supra*, prescribing a maximum of 10 mills for county purposes, does not prohibit a more restrictive legislative limitation of millage for county or district purposes so long as such statute does not permit a county or district to exceed directly or indirectly the constitutional maximum. Since the aggregate millage limitation prescribed by § 193.321[§ 200.071], F. S., does not exceed the 10 mill limit set for counties by Art. VII, it appears to be an existing statute which remains effective under Art. XII, § 6, preserving "all laws in effect upon the adoption of this revision, to the extent not inconsistent with it. . . ."

The legislative purpose is plain from the express declaration of the following provision of the law by which the 10-mill aggregate limit was imposed:

193.327[§ 200.161], *Legislative intent.*—The legislature hereby finds and determines that taxation on real and tangible personal property above the rate of two per cent or twenty mills is oppressive and that there are many areas in the state of Florida in which the combined millage levied against real and tangible personal property by the various taxing authorities, including boards of county commissioners, municipalities, and various other districts and boards, far exceeds a rate of two per cent or twenty mills. Thus, the legislature hereby declares its intent to provide replacement revenues for the operation of local governmental bodies by the fiscal year 1970-1971, or as soon thereafter as possible, so that ad valorem or property taxation may be further reduced to such an extent that it is no longer oppressive and will not exceed an aggregate or total rate of two per cent or twenty mills.

The intended impact of the law will be apparent from a consideration of existing ad valorem tax millages in representative counties approximately as follows (exclusive of special assessments and millage for schools and multiple county districts, to the extent these facts can be determined.):

|              | <u>County</u> | <u>Districts</u> | <u>Aggregate</u> |
|--------------|---------------|------------------|------------------|
| Hillsborough | 12.43         | 2.10             | 14.53            |
| Lee          | 8.796         | 20.57            | 29.366           |
| Orange       | 7.69          | 22.66            | 30.35            |
| Volusia      | 4.375         | 24.52            | 28.895           |

Although future legislative action may alter this impact, since the law, under § 193.324[§ 200.121], F. S., does not reduce existing millages until January 1, 1970, there appears to be no alternative to recognition of the existing statutory mandate, in view of the established precedent in favor of presumptive statutory validity, the lack of clear constitutional inconsistency, and confirmation of intent by provisions of Ch. 69-216, Laws of Florida, amending § 193.321[§ 200.071], F. S., to incorporate reference to appropriate sections of the 1968 State Const.

Your inquiry also states the position that the "Hospital Welfare Board is furnishing a municipal service and may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal services." The provision of Art. VII, § 9(b), State Const., is that a county may to the extent authorized by law make such additional levy. Authorization for such levy under § 193.325[§ 200.141], F. S., is limited to services furnished under charter county or consolidation provisions. The circumstances stated do not sustain a conclusion that the service in question is in fact a municipal service; and even assuming the contrary position, the statutes above cited do not appear to constitute authorization by law to "levy additional taxes within the limits fixed for municipal purposes."



069-72—August 20, 1969

# COMPENSATION OF COUNTY OFFICERS

## CONSTRUCTION OF CH. 69-346, LAWS OF FLORIDA, AMENDING CH. 145, F. S., AS TO COMPENSATION OF COUNTY TAX ASSESSORS

To: William Markham, Tax Assessor, Fort Lauderdale

### QUESTIONS:

1. Were the drainage fees discontinued as of July 1, 1969 or July 1, 1970?
2. If the date is July 1, [1969] would the tax assessor be entitled to one half of the 1% fee?
3. What is the Broward County tax assessor's new compensation and when is it effective?
4. If there is a "grandfather clause" making the compensation the same for 1969 as it was in 1968, does it include the drainage fees?
5. If the compensation is based on 1968, including drainage fees, would it be in order to pay the tax assessor 1/12 of \$21,782.68 or \$1,815.22 per month?

Although Ch. 69-346, Laws of Florida, became a law without executive approval on July 5, 1969, and would therefore take effect sixty days after adjournment *sine die*, I conclude from a consideration of the law that it clearly indicates a legislative intent that upon taking effect its provisions shall relate back to July 1, 1969, even assuming that the direct provision in § 12 (§ 145.15, F. S.) for that effective date was rendered inoperative by absence of the governor's approval on that date. Article III, § 9, State Const.; AGO 067-49, Aug. 10, 1967, Biennial Report of the Attorney General, 1967-1968, p. 78; AGO 061-91, June 2, 1961, Biennial Report of the Attorney General, 1961-1962, p. 145; AGO 058-190, omitted in Biennial Report of the Attorney General, 1957-1958; cf. *State v. Lee*, Fla. 1933, 150 So. 225. Your questions are answered accordingly as follows:

1. Assuming the drainage fees in question are those payable under § 298.401, F. S., then after July 1, 1969, under the terms of § 145.121, F. S. (§ 7, Ch. 69-346, Laws of Florida) they "shall be included as income of the office and shall not be retained by the county official as personal income."

2. I conclude that Ch. 69-346, Laws of Florida, does not terminate any right an assessor may have to fees earned for services rendered prior to July 1, 1969, under provisions of law which were effective and controlling until that date. AGO 069-42, this publication. This conclusion is not in my opinion negated by the provision of § 193.65(4) [§ 192.091], F. S., that all such payments to an assessor shall be "income or compensation of such officer *for the year in which received*." (Emphasis supplied.) Construed in *pari materia*, that section clearly contemplates successive periods of salary computation under the statute of which it is a part, and prevented application of payments to the year in which earned for the purpose of increasing compensation allowed under the statute. AGO 054-64, Mar. 16, 1954, Biennial Report of the Attorney General, 1953-1954, p. 167. Application of Ch. 69-346, however, involves repeal or termination of statutory rights to personal income, and not simply determination of the period to which such payments should be credited. Section 12 of said chapter (§ 145.15,

F. S.) expressly provides against retrospective effect of its provisions prior to July 1, 1969, and in my opinion preserves the right to receive compensation which was earned prior to that time, which under some circumstances could ultimately have been received as personal income, and which therefore constituted an accrued obligation not intended to be impaired by operation of Ch. 69-346 in conjunction with existing § 193.65(4)[§ 192.091], *supra*. Cf *State v. Caruthers*, Fla. 1938, 180 So. 27, a decision sustaining, after enactment of said § 193.65(4), a claim to payments earned by a retired official but received by his successor. I believe, therefore, that you should be entitled to receive full compensation, whenever paid, for services performed before that date, subject only to maximum compensation limitations in effect prior to July 1, 1969.

3. Under § 145.10, F. S., as amended by § 5 of Ch. 69-346, Laws of Florida, your annual compensation appears to be \$18,000, effective July 1, 1969.

4. The compensation prescribed for the period beginning July 1, 1969, and ending July 1, 1970, by § 145.121(2)(c), F. S., added by § 7 of Ch. 69-346, Laws of Florida, for those whose total prior compensation exceeded the salary prescribed by Ch. 69-346, is "an amount equal to their *present* annual compensation." (Emphasis supplied.) This requires payment for the year ending June 30, 1970, of a salary in an amount equal to total compensation received for the last preceding fiscal year, including fees received during that period.

5. If your actual compensation for the last preceding fiscal year, including fees, was \$21,782.68, then a monthly payment of \$1,815.22 would appear to be in order.

069-73—August 20, 1969

#### COMPENSATION OF COUNTY OFFICIALS

#### CONSTRUCTION OF CH. 69-346, LAWS OF FLORIDA, AMENDING CH. 145, F. S., AS TO COMPENSATION OF COUNTY TAX ASSESSORS

To: *David Reid, Tax Assessor, West Palm Beach*

#### QUESTIONS:

1. If the county assessor of taxes concludes his labors in the preparation of assessment rolls for special drainage districts prior to July 1, 1970, would he not then have a vested right to collect the commission authorized by § 298.401, F. S.?

2. If the assessor submits his bill for services rendered prior to July 1, 1970, but payment by the various districts is postponed until such time as they have adequate funds to meet their expenses or if the amount of the assessor's bill is later corrected after the actual amount of tax collections is known, would this in any way alter or affect the right of the assessor to be paid for a job he will have completed prior to July 1, 1970?

On consideration of the provisions of Ch. 69-346, Laws of Florida, I conclude that both questions must be answered in the negative, for the reasons stated in AGO 069-72, this publication.

069-74—August 20, 1969

ASSESSMENT AND COLLECTION OF MUNICIPAL TAXES  
BY COUNTY OFFICIALS

CONSTRUCTION OF CH. 69-1313, AMENDING CH. 65-1923,  
LAWS OF FLORIDA, AS TO COMPENSATION OF MONROE  
COUNTY TAX ASSESSOR

To: *Joe Allen, Tax Assessor, Key West*

QUESTION:

Pursuant to Ch. 69-1313 amending section 6 of Ch. 65-1923, Laws of Florida, which reduced the Monroe County tax assessor's compensation for municipal assessments from 4% to 3%, should the assessor be paid by each municipality for the 1969 tax assessment rolls on the basis of Ch. 65-1923 at 4%, inasmuch as all necessary work on the 1969 tax rolls had been completed?

The question in my opinion should be answered in the affirmative, being governed by the general principle of prospective operation in the absence of any basis in the language of the act for a contrary construction. While previous opinions sustain retrospective application of such laws when the legislative intent is manifest, I find no authority for implying an intent to impair an accrued obligation under a prior law from the simple provision of Ch. 69-1313, Laws of Florida, that "this act shall take effect immediately upon becoming a law." Cf. *Crooks v. State*, Fla. 1940, 194 So. 237; AGO Nov. 12, 1932, p. 692, Biennial Report of the Attorney General, 1931-1932; AGO 050-99, Feb. 28, 1950, Biennial Report of the Attorney General, 1949-1950, p. 230; AGO 054-64, Mar. 16, 1954, Biennial Report of the Attorney General, 1953-1954, p. 167; AGO 069-42 this publication. Rate of payment for services theretofore completed is therefore not affected.

069-75—August 21, 1969

1969-1970 GENERAL APPROPRIATIONS ACT

CONSTRUCTION OF MEMORANDA: PARAGRAPHS (a)-(c), CON-  
TAINED IN ITEM 329, AND MEMORANDUM FOLLOWING ITEM  
331, § 1, CH 69-100, LAWS OF FLORIDA

To: *Ray C. Osborne, Lieutenant Governor, Tallahassee*

STATEMENT OF FACTS:

The appropriations act (Ch. 69-100, Laws of Florida) adopted by the 1969 Legislature to cover the fiscal year 1969-1970 provides:

No money appropriated to the Florida Development Commission in item number 327 through item number 331 shall be spent for maintaining an office in Washington, D. C., nor shall said moneys be spent for goods, commodities, or other items to be given away, except that orange juice may be dispensed at welcome stations and printed publications, letters, and pamphlets may be dispensed to the general public.

QUESTION:

Based upon the above statement of facts, what is the proper interpretation to be placed upon the phrase "... goods, commodities, or other items to be given away ..."?

The State Const. of 1968, in Art. VII, §(1)(c), provides that, "No money shall be drawn from the treasury except in pursuance of appropriation made by law." Article IX, §4, of the State Const. of 1885, contained an identical provision. These provisions mean a statute adopted by both houses of the legislature. Advisory Opinion, 156 Fla. 48, 22 So.2d 398, text 400. Before any of the items mentioned in the above question may be purchased and distributed at state expense, there must be a legislative appropriation therefor, which may be by general appropriation or other authorized legislative appropriation.

Therefore, unless there is a legislative appropriation providing funds for the purchase and distribution of the items, objects, and things mentioned in your said question, they may not be purchased and distributed at state expense. Appropriation acts, in the earlier days of the state, were in much more detail (see Ch. 5114, Laws of Florida, 1903) than is the current one (see Ch. 69-100, Laws of Florida), which fixes, in most cases, lump sum appropriations, for instance "Salaries, Retirement and S.S. Matching; Other Personal Services, Expenses, Operating Capital Outlay and Grants and Aids." Item 329, §1, Ch. 69-100, Laws of Florida, makes an appropriation from the general revenue fund, specific sums being earmarked for paid advertising, promotion, and general administrative.

The above question does not seem to relate to salaries, retirement and social security contributions, or to other personal services, or operating capital outlay, so that your question must relate to *expenses* or *grants* and *aids*. The moneys appropriated for expenses appear to be earmarked for paid advertising, promotion, and general administrative, each of which has footnotes marked (a)-(c), providing as follows:

(a) Money appropriated for paid advertising expenses shall be used only for definitive, identifiable advertising time or space for the promotion of Florida and such expenses as are directly necessary to the placing of such advertising. Money appropriated for paid advertising shall be spent in the ratio of sixty per cent and forty per cent for tourist advertising and industrial advertising respectively.

(b) Money appropriated for promotion shall be used only for goods and services directly related to the promotion of Florida. Such moneys shall not be spent for paid advertising as defined in (a) above, nor shall they be spent for the expenses or services of Commission personnel who are engaged in promoting Florida or in other activities of the Commission.

(c) Money appropriated for administration expenses shall be spent for authorized necessary expenses of the Commission other than those defined in (a) and (b) above.

At the end of the appropriations to the said Florida Development Commission is an additional unnumbered footnote providing as follows:

No money appropriated to the Florida Development Commission in item number 327 through item number 331 shall be spent for maintaining an office in Washington, D. C., nor shall said moneys be spent for goods, commodities, or other items to be given away, except that orange juice may be dispensed at welcome stations and printed publications, letters, and pamphlets may be dispensed to the general public.



The several items mentioned in your question appear to relate to promotional expenses and not to either advertising or general administrative expenses, so that we are concerned with the appropriation for *promotional expenses*. The word "promote" is defined in Black's law dictionary as, "To contribute to growth, enlargement, or prosperity of; to further; to encourage; to advance." Dictionaries, to illustrate what is meant by the word *promote*, use the words "to help, encourage, exist, flourish, advance, to elevate, raise, perform, advance..." An examination of the terms "goods, wares and merchandise" and similar terms, in Words and Phrases, seems to indicate that both of said terms embrace and extend to tangible personal property, a term used in connection with the sale and distribution of tangible personal property. See 38 C.J.S. 942-945. The meaning of the word *commodities* is substantially the same as the term goods, wares and merchandise. Black's law dictionary, defines the word "commodity" in its most comprehensive sense as "convenience, accommodation, profit, benefit, advantage, interest, commodiousness." See also 7A Words and Phrases 588-596. The word *commodities* "is a broader term than merchandise, and, when referring to commerce, may include almost any article of movable or personal property." (Black's law dictionary) See also 15A C.J.S. 14-16.

To accomplish the purposes for which the Florida Development Commission was established, it is given power and authority, by § 288.03, F. S., in part to:

(1) Create and build Florida industries, promote commerce and sale of Florida products, encourage employment for Florida citizens, encourage visitors from other states and countries to come to Florida, and raise the earning level of Florida's citizens; and in order to promote and develop business, agriculture, industry, commerce and employment for citizens of the state, to plan and conduct a campaign of information, advertising and publicity relating to the business, industrial, commercial, agricultural, educational, recreational, scenic, historic, transportation and residential facilities, advantages, products and attractions of the state and all parts thereof; and to disseminate any such information pertaining to Florida through and by means of the following media: newspaper advertising outside the state; magazine advertising in magazines of national circulation; outdoor advertising outside the state; radio and television advertising over stations outside the state or networks extending outside the state; preparing and circulating motion pictures; preparing, purchasing and distributing by mail, or by other means of advertising, literature and other material, including exhibits; and, although not specifically detailed but nevertheless included in such media, the promotion and encouragement of and, if necessary, the contribution to the happening and the holding of events and activities within the state, including follow-up contacts by personnel of the commission within or without the state, which in the judgment of the commission will *beneficially publicize the state* in furtherance of the purposes, powers and duties of the commission as prescribed in this chapter. (Emphasis supplied.)

Should any conflicts arise between said § 288.03, F. S., and the above-mentioned footnotes (a)-(c), relating to Item 329, § 1, Ch. 69-100, Laws of Florida, and the unnumbered footnote following Item 331 of said section, Ch. 69-100 will control for the current fiscal year of

1969-1970. Likewise the unnumbered footnote, following item 331 is also the controlling law for the said 1969-1970 fiscal year. Footnote (b) above, mentioned the funds appropriated for expenses by Item 329 to use *only for goods and services directly related to the promotion of Florida*, and the unnumbered footnote following Item 331, requires that the said appropriated moneys shall not "be spent for *goods, commodities, or other items to be given away*, except that orange juice may be dispensed at welcome stations and printed publications, letters and pamphlets may be dispensed to the general public." These two limitations must be read together.

The State Const. as revised in 1968, under the provision of Art. IV, § 6, as implemented by Ch. 69-106, Laws of Florida (§ 20.17(5), F. S.), provides the Florida Development Commission created under Ch. 288, F. S., shall be transferred by a type 3 transfer to the department of commerce and its functions shall be assigned to the division of commercial development. A type 3 transfer is designated (§ 20.06(3), F. S.) as follows:

A type three (3) transfer is the merging into a department of an existing agency or if elsewhere in this act certain identifiable programs, activities or functions have been removed from an existing agency, it is the merging into a department of the existing agency with the certain identifiable programs, activities or functions removed therefrom. Any agency transferred by a type three (3) transfer shall have all its statutory powers, duties and functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds, except those transferred elsewhere by other provisions of this act, transferred to the department to which it is transferred. The transfer of segregated funds shall be made in such manner that the relation between program and revenue source as provided by law is retained. If an agency transferred by a type three (3) transfer was headed by a board, however designated, all of the board's statutory powers, duties and functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds, except those transferred elsewhere by other provisions of this act, are transferred to the department to which the agency is transferred, and the board is abolished.

As the statutory powers, duties and functions, records, personnel, property, and unexpended balances of appropriations, allocations or other funds are transferred to the department of commerce with funds segregated in the appropriations act (Ch. 69-100, Laws of Florida, to items 327-331) to provide for the continuing relationship between the programs of the old Florida development commission and the new department of commerce, division of commercial development, the limitations as above indicated in Ch. 69-106, Laws of Florida, must apply equally to the department of commerce, but only insofar as the agency being transferred by the type 3 transfer. This is further limited by Art. III, § 12, State Const., as amended in 1968, wherein appropriations bills may not contain provisions on other subjects.

A fortiori, therefore, the limitation in the appropriations bill is confined to the transferred statutory powers, duties, and functions.

The question presented is in two parts; i.e., advice on the proper interpretation to be placed upon the phrase "goods, commodities, or

other items to be given away" and whether the department of commerce may purchase and distribute certain scheduled items.

Certainly the division of commercial development may not do so unless there is specific legislative appropriation providing funds for the purchase and distribution of the items, objects and things overriding the proscription of Ch. 69-100, Laws of Florida.

069-76—August 21, 1969

### TAXATION

#### MILLAGE LIMITATION PRESCRIBED BY ART. VII, § 9, STATE CONST.—CONSTRUCTION OF § 582.44, F. S.

To: *Robert N. Morris, Administrator, State Soil and Water Conservation Board, Gainesville*

#### QUESTION:

Is the millage rate as proposed in § 582.44, F. S., subject to the maximum of 10 mills which has been established?

Chapter 69-235, Laws of Florida, contains amendments and additions to Ch. 582, F. S., authorizing creation of watershed improvement districts or subdistricts and providing in § 6 for addition of § 582.44, F. S., stating that district boards may "levy annually a uniform ad valorem tax on all taxable property in the district . . . [which] shall not exceed the rate of three (3) mills on the dollar of the assessed value . . . ."

Section 582.331, F. S., is also added, to prescribe district functions which include the purposes of "preservation and protection of land and water resources, and protection and promotion of the health, safety, and general welfare of the people of this state." The levy authorized for these purposes does not appear to meet the usual criterion for special assessments, i.e. special enhancement of the value of the property affected, and therefore would not be within the exclusion stated in § 193.321[§ 200.071], F. S., which statute prohibits tax levies by counties and districts therein at a rate in excess of ten mills "except for special benefits." AGO 068-85, July 23, 1968, Biennial Report of the Attorney General, 1967-1968, p. 299; AGO's 069-22, and 069-71, this publication.

A further problem may be presented by the provision in new § 582.36, F. S., for approval of the creation of districts, having the taxing power above noted, by referendum at which "each owner . . . shall be entitled to cast one (1) vote . . . for each acre . . . of land within the proposed district belonging to such owner . . ." Article VII, § 9, of the 1968 State Const. limits special district ad valorem tax millage to that "approved by vote of the electors who are owners of freeholds therein." Article X, § 12, State Const., provides "Vote of the electors" means the vote of the majority of *those voting* . . ." (Emphasis supplied.) These provisions amount to a specific constitutional prescription by which special district tax millage must be approved by a majority of those electors voting. Approval by a majority of votes cast under the formula stated in § 582.36, F. S., does not appear to meet the literal constitutional terms.

The question presented is answered in the affirmative, my conclusion being that the 10 mill maximum would apply, if the levy can in

the first instance be brought within the present constitutional limits for special district millage.

069-77—August 21, 1969

### TAXATION

#### SPECIAL DISTRICT MILLAGE—CH. 65-1828, LAWS OF FLORIDA, BONITA SPRINGS FIRE CONTROL DISTRICT, LEE COUNTY

To: *Leon L. Black, Secretary-Treasurer, Bonita Springs Fire Control and Rescue District, Bonita Springs*

#### QUESTION:

Does the board of county commissioners for Lee County have authority to reduce to less than three mills (the maximum provided by Ch. 65-1828, Laws of Florida) the levy required to meet the operating estimate prepared by the fire control and rescue board under that law?

The provisions of Ch. 65-1828, Laws of Florida, together with amendatory Ch. 68-90, Laws of Florida, control the Bonita Springs fire control and rescue district, covering specified portions of Lee County, and vest in a fire control and rescue board the responsibility for preparing its budget and submitting same to the board of county commissioners of Lee County. Section 6 of the law provides that "the board of county commissioners shall fix and cause to be levied on all property of the district, real and personal, a millage sufficient to meet the requirements of the estimate so made by the fire control and rescue board; provided, however, three (3) mills is the maximum that can be levied in any one (1) year." Section 12 of the act requires ratification by vote of freeholders.

Section 193.321[§ 200.071], F. S., vests in boards of county commissioners or county budget commissions the authority to apportion ad valorem millage for county and district purposes when the aggregate millage exceeds ten mills "for said county and districts therein." The 1968 State Const. contains a prohibition against ad valorem tax levies in excess of certain prescribed millage for county, school and municipal purposes, and "for special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation." Article VII, § 9, State Const., 1968. Existing laws are preserved by Art. XII, § 6, State Const. "to the extent not inconsistent with" the revised constitution, and Art. XII, § 15 provides:

**Special district taxes.**—Ad valorem taxing power vested by law in special districts existing when this revision becomes effective shall not be abrogated by Section 9(b) of Article VII herein, but such powers, except to the extent necessary to pay outstanding debts, may be restricted or withdrawn by law.

In view of the specific provision of Art. XII, § 15, State Const., that special district powers may be restricted by law, and the apparent reference to existing as well as future law (AGO 069-7, this publication), I conclude that § 193.321[§ 200.071], F. S., is consistent with Art. VII, § 9, of the State Const. and therefore effective to permit reduction of district millage by the board of county commissioners to less than the statutory maximum, under circumstances specified in the law.



Your question is therefore answered in the affirmative, although the language of Ch. 65-1828, Laws of Florida, in the absence of § 193.321[§ 200.071], F. S., would apparently leave no discretion in the board of county commissioners with respect to district millage other than to fix "a millage sufficient to meet the requirements of the estimate so made by the fire control and rescue board," provided the proposed expenditures are for district purposes and the maximum millage under the act is not exceeded. *State ex rel. Robertson et al. v. Gessner*, 153 Fla. 865, 16 So.2d 51; *Hunter v. Owens*, 80 Fla. 812, 86 So. 839. Fla. Law & Practice, Vol. 23, p. 68.

069-78—August 25, 1969

#### GAME AND FRESH WATER FISH COMMISSION

##### CONSTRUCTION OF §§ 20.25 AND 20.05, F. S., AS TO FUNCTIONS, POWERS, AND AUTHORITY OF THE COMMISSION

To: *Randolph Hodges, Executive Director, Department of Natural Resources, Tallahassee*

#### QUESTION:

Did the legislature, pursuant to Ch. 69-106, Laws of Florida (Governmental Reorganization Act), transfer all functions, powers, and authority of the game and fresh water fish commission prescribed by Art. IV, § 9, of the State Const. to the department of natural resources as created in § 25 of Ch. 69-106 (Ch. 20, F. S., Governmental Reorganization Act)?

Article IV, § 9, of the 1968 State Const., provides:

**SECTION 9. Game and fresh water fish commission.**—There shall be a game and fresh water fish commission, composed of five members appointed by the governor for staggered terms of five years. The commission shall exercise the non-judicial powers of the state with respect to wild animal life and fresh water aquatic life, except that all license fees for taking wild animal life and fresh water aquatic life and penalties for violating regulations of the commission shall be prescribed by specific statute.

Section 20.25, F. S., creates a department of natural resources, headed by the governor and cabinet. Within the department of natural resources there is created a division of game and fresh water fish. (See § 20.25(2)(d), F. S.) Section 20.25(17), F. S., states:

(17) The game and fresh water fish commission *functions*, prescribed by chapter 372, Florida Statutes, are transferred by a type one transfer to the department of natural resources, except that the commission shall exercise its *powers* prescribed by § 9 of Art. IV of the state constitution, independently of the head of the department of natural resources. (Emphasis supplied.)

It appears the legislature attempted to transfer the "functions" of the game commission to the new department but reserved "powers" to the commission acting in the capacity of a division. This strange alignment has created some rather difficult questions to resolve, keeping in mind the constitution and the language utilized in the reorganization

act. The legislature intended to keep the commission functioning as it did prior to reorganization. See § 20.25(17) quoted above. The powers prescribed in Art. IV, § 9, of the State Const. are set out above.

There seems to be no question as to the power of the commission to regulate wild animal life and fresh water aquatic life with reservations not pertinent to this subject matter. However, it does seem clear that the legislature intended to "functionally" place the commission under the administration of the department of natural resources, the head being the governor and cabinet. (See § 20.25(17), F. S.)

Section 20.04(1) and (4) state respectively:

The department is the principal *administrative* unit of the executive branch. . . .

Unless specifically authorized herein, the head of the department shall not reallocate *duties* and *functions* specifically assigned herein to a specific unit of the department. . . . (Emphasis supplied.)

In this instance "powers" have been specifically authorized and retained by the "commission." (See § 20.25(17), F. S., and Art. IV, § 9, State Const.)

Section 20.05, F. S., states in part:

**Heads of departments; powers and duties.**—Each head of a department, except as otherwise provided herein, shall:

(1) Plan, direct, coordinate and *execute the powers, duties, and functions* vested in that department or vested in a division, bureau, or section of that department; *powers* and duties assigned or transferred to a *division, bureau, or section* of the department *shall not be construed* to be a limitation upon *this* authority and responsibility; (Emphasis supplied.)

All this leads to the logical conclusion that although the legislature intended to place "functions" of the commission under the administration of the department head and retain "powers" in the commission as a division, the language in § 20.05(1), *supra*, prohibits placing a limitation on the authority of the department head over a division regardless of a specific provision to do so. Herein lies the conflict.

In one move the legislature retained the integrity of the "commission" as it was prior to reorganization but in a second move it prohibited the tampering with the authority of a department head, including the dilution of "power" to administer, all to the end of accomplishing efficiency and economy.

In an attempt to clarify this position of the legislature it seemed desirable to gather all the attendant circumstances and background in the formulation of § 20.25, F. S. The consensus indicates that the legislature, in structuring this department along functional or program lines, placed the game and fresh water fish commission within the department of natural resources. But it intended to retain the commission's "powers"—whatever they are or may become.

To approach this question on unfettered logical steps would be to thwart the will of the legislature. Relief can be found in § 2(3) of the act [§ 20.02(3), F. S.], which states:

Structural reorganization should be a continuing process through careful executive and legislative appraisal of the placement of proposed new programs and the coordination of existing programs in response to public needs.

Unless there exists strong opposition or reasons calculated to bring about a desirable solution to a fundamental conflict, it is suggested that the department of natural resources (governor and cabinet), recognizing the difficulties in the implementation of reorganization, delegate to the division of game and fresh water fish the authority not only to administer its division functionally but to carry out its powers as recited in § 20.25(17), F. S., Art. IV, § 9, State Const., and Ch. 372, F. S., unless and until otherwise prescribed by the legislature or a court of competent jurisdiction.

The areas of budgeting, programming, planning, and general administration of the division should be retained by the division, which shall inform the department head, in this instance the governor and cabinet, of its activities.

069-79—August 26, 1969

#### GOVERNMENTAL REORGANIZATION

##### TRANSFER OF EVERGLADES FIRE CONTROL DISTRICT TO DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES—CHS. 125 and 379, F. S.

To: *Doyle Conner, Commissioner, Department of Agriculture and Consumer Services, Tallahassee*

#### QUESTIONS:

1. What is the date and year of "the next ensuing fiscal year" of Palm Beach, Dade, Hendry, Martin, Broward and Monroe counties?

2. Is the Florida Department of Agriculture, through the Division of Forestry, authorized to expend funds from the appropriation, provided for the administration of Ch. 379, F. S., if the board of county commissioners, in each case, does not provide funds within the limits of § 125.26, F. S.?

3. If the answer to question two is in the negative, is the Department of Agriculture, through the Division of Forestry, authorized to expend other appropriated funds to provide services authorized under Ch. 379, F. S.?

The first question poses the question of the beginning and ending of "the next ensuing fiscal year" for each of the eleven counties in the Everglades fire control district, including Palm Beach, Dade, Hendry, Martin, Broward, Monroe and others. The fiscal year of the county annual budget begins on Oct. 1 in one year and ends on Sept. 30 of the following year (§ 129.04, F. S.). The school fiscal year of the counties, under § 228.041(20), F. S., begins on July 1 in one year and ends on June 30 of the following year; and the state fiscal year begins on July 1 of one year and ends on the following June 30.

The Webster's dictionary defines "ensue" as following or to follow; to follow as a consequence or in chronological succession and gives as an example "the year following." Black's law dictionary defines the word "ensue" as "to follow after; to follow in order or train of events." 30 C.J.S. 711, notes 27-33; 14 Words and Phrases, 305-306.

The consolidation and reorganization of the state government by Ch. 69-106, Laws of Florida, pursuant to Art. IV, § 6, State Const. of 1968, became a law on June 19, 1969, upon its approval by the governor on said date, and became effective with the beginning moments of July 1, 1969. The next ensuing fiscal year of the counties of the state, following said July 1, 1969, will be Oct. 1, 1969. The next ensuing fiscal year for each of the eleven counties in the Everglades fire control district, including Palm Beach, Dade, Hendry, Martin, Broward, Monroe and others, after the effective date of said Ch. 69-106, Laws of Florida, will begin on Oct. 1, 1969, and end on Sept. 30, 1970.

The second question concerns those counties of the state mentioned in Ch. 379, F. S., which made up the Everglades fire control district, which originated as Ch. 19274, Laws of Florida, 1939. The purpose of this legislation was the protection of the Everglades, within the counties mentioned in said Ch. 379, against muck and other fires originating within said counties. Section 14(15), Ch. 69-106, Laws of Florida (§ 20.14(15), F. S.), transferred the said fire control district by a type (3) transfer, as provided for by § 6(3)(§ 20.06(3), F. S.), of said chapter, to the department of agriculture and consumer services, which transfer had the effect of merging the said Everglades fire control district "with the certain identifiable programs, activities or functions removed therefrom," if such was the case, with the department of agriculture and consumer services. Provision is made in said § 6(3), Ch. 69-106 (§ 20.06(3), F. S.), for the transfer of unexpended portions of appropriation balances, "except those transferred elsewhere by other provisions of this act... to the department to which it is transferred...."

Under § 14(15), Ch. 69-106, Laws of Florida (§ 379.041, F. S.), the boards of county commissioners are required to finance the operation of Everglades fire control "beginning [with] the next ensuing fiscal year," that is, Oct. 1, 1969. Unused appropriations may be used to finance fire control operations from the end of the state fiscal year (July 1, 1969) until the beginning of the county fiscal year (Oct. 1, 1969). The state may not finance Everglades fire control operations beyond Sept. 30, 1969. Due to the fact that the statutes require county financing of such operations beginning Oct. 1, 1969, unused and unencumbered state appropriated funds may not be used to pay expenses beyond Sept. 30, 1969. These observations answer the second question.

My above observations and considerations lead to a negative answer to the third question, as to obligations accruing after Sept. 30, 1969, the beginning of the county fiscal year.

069-80—August 28, 1969

#### COMPENSATION OF COUNTY OFFICIALS

CONSTRUCTION OF CH. 69-211, LAWS OF FLORIDA, (§ 145.16, F. S.),  
ENTITLED SPECIAL LAWS OR GENERAL LAWS OF LOCAL  
APPLICATION PROHIBITED, ENACTED PURSUANT  
TO ART. III, § 11(a)(21), STATE CONST.

To: *Ralph D. Turlington, State Representative, Gainesville*

#### QUESTION:

Is it possible to pass special legislation providing for compensation of the officers listed in § 145.16(2), F. S., without repealing or amending said section?

The cited constitutional provision, Art. III, § 11(a)(21), State Const., states "There shall be no special law... pertaining to... any subject



when prohibited by general law passed by a three fifths vote of the membership of each house. Such law may be amended or repealed by like vote." In view of this provision, I conclude that Ch. 69-211, Laws of Florida, became effective on July 1, 1969, prohibiting and preventing effectiveness of any special act on the specified subject thereafter until amendment or repeal of Ch. 69-211. The rule by which priority is accorded a later enactment, when inconsistent laws are enacted during the same legislative session, is a rule of construction for determination of presumed legislative intent and does not appear to be relevant or controlling in the case of a constitutional provision permitting, by a three fifths vote, an express legislative proscription of special acts on designated subjects, and permitting amendment thereof, direct or indirect, only by acts passed by like vote. Cases collected Fla. Law & Prac. Vol. 22, Stat. §§ 49, 87. Your question is accordingly answered in the negative.

069-81—August 28, 1969

#### STATE PUBLIC BUSINESS

#### PATENTS, TRADEMARKS, COPYRIGHTS, ETC., CONSTRUCTION OF §§ 286.021 AND 286.031, F. S., AS TO THE AUTHORITY OF DEPARTMENT OF GENERAL SERVICES

To: *Chester Blakemore, Executive Director, Department of General Services, Tallahassee*

#### QUESTION:

Does § 22(9), Ch. 69-106, Laws of Florida (§ 20.22(8), F. S.), specifically transferred, by a type 3 transfer as set forth in § 6(3), Ch. 69-106, Laws of Florida (§ 20.06(3), F. S.), give all of the authority and responsibility of the board of commissioners of state institutions concerning patents, trademarks and copyrights to the new department of general services?

Upon reading §§ 272.01 [§ 286.021], and 272.02 [§ 286.031], F. S., it appears clear that the power now vested in the department of general services with respect to patents, trademarks, and copyrights is sufficiently broad and all-encompassing to create a statutory responsibility within your department which seems to exceed your specific question.

Although I can see no objection to the use of suggestions by other state agencies that have a special expertise or knowledge with respect to possible patent policy, it is my feeling that the legislature intended that the department of general services initiate and have full control over any patent policy with respect to every right, interest, claim or demand of any kind concerning a patent now owned or held, or one which may hereafter be acquired, owned, or held by the state.

With reference to the memorandum of the department of citrus enclosed with your inquiry, I would additionally observe that neither Ch. 601, F. S., nor the reorganization act (Ch. 69-106, Laws of Florida) empowers the department of citrus to apply for, hold, or consent to the use of any patent, or to license, lease, or assign any patent to any person, or otherwise consent to the manufacture or use thereof on a royalty basis.

069-82—September 17, 1969

POLICE STANDARDS COUNCIL

MEMBERSHIP—AS AFFECTED BY § 24(4), CH. 69-106,  
LAWS OF FLORIDA (§ 20.24(4), F. S.)

To: Jack Ledden, Executive Director, Police Standards Council, Tallahassee

QUESTION:

Pursuant to § 24(4) of Ch. 69-106, Laws of Florida (§ 20.24(4), F. S.), the Governmental Reorganization Act, who will succeed Colonel H. N. Kirkman on the police standards council as the director of the department of highway safety?

Section 23.062, F. S., provides for a police standards council to consist of 12 members, four of whom are designated officers and the remainder of whom are appointments of the governor. Colonel Kirkman, during his service as director of the department of public safety, has filled one of the designated positions.

The consolidation of various agencies under the recently enacted governmental reorganization plan has created a division of Florida highway patrol within the department of highway safety and motor vehicles. This was effected by a type 3 transfer; Governmental Reorganization Act (§ 20.24(4), F. S.). A type 3 transfer according to § 20.06(3), F. S., calls for all of the statutory powers, duties, and functions to be transferred to the new department.

Section 23.062, F. S., made the director of the department of highway safety and motor vehicles a member of the council as the executive director or chief administrative officer of the department—not as the “commander of the Florida Highway Patrol.” It was by virtue of his position as director of the old department that he became eligible for and by statute a member of the council, and he could continue as a member of the council only so long as he continued to be director of the department. Neither the commander of the highway patrol nor any other officer or employee of the highway patrol was eligible.

The several division heads or division directors under either the old department or the new department should not be construed or deemed to be director of the department within the meaning of § 23.062, F. S. They are simply subordinate employees and administrative officials or employees of subdivisions of the department, albeit principal units of the department, and are the directors of such subdivisions or subunits, not directors or executive directors of the department or principal unit of the executive branch.

The new department under the reorganization law, to which the old department was transferred and into which it was merged, simply replaces or succeeds to the old department of public safety within the meaning and purview of § 23.062, F. S. The new executive director of the new department is the successor to the director of the department within the purview of § 23.062 and as the chief administrative officer of the new department is the ex officio member of the council by virtue of his position or office as executive director of the new department.

Since the former executive director of the old department has been appointed as the executive director of the new department and continues

as the chief administrative official of the department, he either continues on as a member of the council or by virtue of his appointment to, and the holding of, the position of executive director of the department he has become a member of the council under § 23.062, F. S. Since both the old and new director are one and the same individual, and since the old department actually is one and the same as the old department with additional powers and duties and under a new name, the membership on the council of Colonel Kirkman should continue without interruption so long as he continues to be the executive director of the new department.

069-83—September 17, 1969

#### COMPENSATION OF COUNTY OFFICIALS

SALARIES FOR TAX ASSESSOR AND TAX COLLECTOR,  
JEFFERSON COUNTY—CH. 69-346, LAWS OF FLORIDA  
(§ 145.022, F. S.)—MONTHLY ADVANCES PURSUANT  
TO § 193.671[§ 192.114], F. S.

To: *Letty H. Flewellen, Tax Collector, Monticello*

#### QUESTION:

In view of the repeal of Ch. 65-1150, Laws of Florida, may the tax assessor and the tax collector revert to § 193.671[§ 192.114], F. S., providing for monthly advances to them by the board of county commissioners?

Chapter 59-62, Laws of Florida(§ 192.114, F. S.) apparently remains effective to the extent necessary to permit an affirmative answer to your question. However, Ch. 69-346, Laws of Florida, provides by additional § 145.022, F. S., that:

Any board of county commissioners, with the concurrence of the county official involved, shall by resolution guarantee and appropriate a salary to the county official, in an amount not to exceed that specified in this chapter, if all fees collected by such official are turned over to the board of county commissioners. Copies of the resolution adopted shall be filed with the department of banking and finance and the auditor general.

These provisions, construed together, permit monthly advancements with annual accounting under the terms of § 193.671[§ 192.114], F. S., or, in the alternative, a guaranteed salary payable monthly "if all fees... are turned over to the board of county commissioners." §§ 145.022 and 145.12, F. S.

069-84—September 17, 1969

#### REGULATION OF TRAFFIC ON HIGHWAYS

CONSTRUCTION OF § 317.201, F. S., IN CONNECTION  
WITH PROSECUTIONS FOR DRIVING WHILE  
INTOXICATED

To: *William W. Dishong, Prosecuting Attorney, Arcadia*

#### QUESTIONS:

1. Does the state have to prove that all of the defendant's normal faculties were impaired or is it sufficient to prove that any one of his normal faculties was impaired by the use of

alcoholic beverages, etc., in order to justify a conviction for driving while intoxicated?

2. In such a trial for D.W.I. (Driving While Intoxicated), on cross-examination, can the state inquire into defendant's prior criminal record, in the event defendant takes the stand to testify?

3. In the event the arresting officer does not have facilities available to give a chemical test of the arrested person's breath, blood, saliva, or urine, as per § 322.261(1)(g), F.S., when requested by the accused, does this fact prevent the accused from being convicted by other evidence?

In regard to your first question, the proper test is not *how many* of a person's faculties were impaired but, rather, if the result of the impairment of any one or more of them was to render him deprived of the *normal control* of his body or mental faculties. The Supreme Court of Florida has found such to be the proper issue in determining what conditions were to be included by § 317.201, F.S. That Court, in *Clowney v. State*, 102 So.2d 619 (1958), explained how intoxication is not a matter to be produced by a prescribed formula, but rather:

... [S]omewhere between the point of utter sobriety and the point of saturation, or immobility, the imbibor reaches the condition that makes him, at the wheel of a dangerous instrumentality, a motorcar, a killer. Just when this point is reached no person could describe with definition because of the varied reactions of human beings to the effects of alcohol. Nevertheless, juries have the responsibility of deciding the issue in such cases and they are entitled to the soundest advice the court can give. . . . (102 So.2d at 62)

In that case, the Supreme Court approved the instructions of the trial court judge, whereby he altered the definition of intoxicated reading from "... full possession of ... normal faculties ... normal control of ... body or mental faculties ..."

A general overview of how various other states and jurisdictions handle the establishment of a standard to determine what constitutes intoxication is provided in annotation form at 142 A.L.R. 555. Therein it is clearly shown that the great majority of the states agree with the tone of this opinion, in that a person is deemed intoxicated:

... [W]hen he has imbibed enough liquor to render him incapable of giving that attention and care to the operation of his automobile that a man of prudence and reasonable intelligence would give. (142 A.L.R. at 558)

Thus, in answer to question 1, the state is not required to establish the impairment of any certain number of faculties. Rather, the test to be employed, as outlined above, is to be subjective in nature.

In answer to question 2, a witness, regardless of whether he is a party to the particular cause, ordinarily may not be impeached as to collateral matter brought out on cross-examination. But, in Florida, by virtue of § 90.08, F.S., prior conviction of crime may be shown for this purpose. This applies to a defendant in a criminal proceeding who testifies on his own behalf as well as to any other witness. The permissible procedure for such cross-examination is well stated in *Lockwood v. State*, 167 So.2d 770 (2d D.C.A. 1958). Therein, the Court explained, at p. 772:



In *Mead v. State*, *supra*, [86 So.2d 773] and cases therein cited, we find a rather clear-cut procedure to be followed by the state in cases such as the one we now have before us. When the defendant testifies in his own behalf, he may be asked whether he has ever been convicted of a crime. If he admits such conviction, assuming for the moment there was only *one*, the matter must stop at that point. If he denies such conviction, the state may, on rebuttal, put the record of the conviction into evidence and show that defendant is the person named in such record. . . . (Emphasis supplied.)

The court, in *Lockwood v. State*, *supra*, proposes that a prosecutor may continue his cross-examination by inquiring as to how many times the defendant-witness had been previously convicted. Cited in support of the above are *Watts v. State*, 160 Fla. 268, 34 So.2d 429 (1948) and *Collins v. State*, 155 Fla. 141, 19 So.2d 718 (1944).

More recently, the point in question was considered by the 1st Dist. Ct. of App. in *Harris v. State*, 208 So.2d 108 (1968). There, the Court very clearly stated:

... On cross-examination, it is proper to question a witness as to whether he has ever been convicted of a crime. F.S. 90.08, F.S.A. *Hill v. Sadler*, 186 So.2d 52 (Fla. App. 2d 1966); *Lockwood v. State*, 107 So.2d 770 (Fla. App. 2d, 1958). . . . (208 So.2d at 109)

It must be emphasized that the above explanation speaks to the permissibility of questioning a defendant-witness as to his past criminal record, even to the extent of inquiring into the number of prior convictions contained within that record. But the law of Florida is explicit in its prohibition of any further questioning as to the nature of the crimes contained in such a prior record. Certain exceptions do exist to the above statements, but such do not apply to the situation concerning which you have inquired.

One final observation should be made in answer to this question. In the conduct of a trial charging a violation of § 317.201, F. S., the necessity of proving the prior or historical commission of the offense is for the purpose of increased punishment and is not a necessary element to be established to sustain a present charge. See *State ex rel. Lockmiller v. Mayo*, 88 Fla. 96, 101 So. 228; *Cross v. State*, 96 Fla. 768, 119 So. 380; *Lamb v. State*, (Fla. App. 1963) 151 So.2d 884; *County of Dade v. Malony*, (Fla. App. 1965) 175 So.2d 239. Thus, there remains no logical argument that inquires into the nature of the crimes involved in a defendant's prior criminal record which would be relevant to the case at bar.

A response to the third question presented by you requires a review of the purpose and nature of the procedures established by § 322.261, F. S. The law was enacted in order to arm the proper law enforcement officers of this state with an effective means for securing evidence of violation of § 317.201, F. S. It was not intended to be a summarial determination of innocence or guilt. Rather, serving its very important function as a tool of the prosecution, to be employed as are other available tools, it was enacted with the purpose of presenting the facts as they exist in the establishment of the case before the bar.

In light of the above, it must be noted that a refusal of a defendant to submit to the test provided for by § 322.261, F. S., is not to be taken as an indication or an inference of guilt. In such a case, the burden of the state remains. The elements to be proven must still be

proven, but without the aid or assistance of any chemical test for intoxication. As was stressed above, any such test is only a tool to be used in the process of gathering evidence.

Section 322.261(1)(g), F. S., specifically provides that "Any person arrested . . . may request the arresting officer to have a chemical test made . . . and, if so requested, the arresting officer *shall* have the test performed." (Emphasis supplied.) The crux of your inquiry lies in the strength to be applied to the phrase "the arresting officer *shall* have the test performed." This office believes that such language constitutes a very important and effective protection of the public. It provides the individual citizen with a means to gather his own evidence and establish his own case. It is obvious that such protection must be guaranteed and guarded from any discretionary temptations which might arise.

Nonetheless, it cannot be held that a refusal of an arresting officer to act in accordance with the statute and perform the requested test when such is reasonably available will act as a bar to conviction under § 317.201, F. S. With reference to the reasoning of the statute as a tool for the prosecution to gather evidence, it is the opinion of this office, in absence of any judicial comment on the matter, that a person arrested and charged with a violation of § 317.201 who requests a proper chemical test to aid in the determination of his sobriety and is denied such may introduce this fact to the trial court. Whatever effect this would have on the defendant's case would be left to the trier of fact. Yet, it cannot be denied that if the facilities were available and the use of such was requested and improperly denied, a reasonable question of why might arise in the mind of that trier of fact. The burden of the state would not change, but the task of fulfilling such would conceivably include a certain amount of explanation.

I cannot reach any other answer to your third question than no. A refusal by an arresting officer to act in accordance with a proper request pursuant to § 322.261(1)(g), F. S., does not prevent the accused from being convicted by other evidence.

069-85—October 10, 1969

#### SAVINGS ASSOCIATION ACT

#### CONSTRUCTION OF § 665.521, F. S., AS TO EXEMPTION OF SAVINGS AND LOAN ASSOCIATIONS FROM IMPOSITION OF TAXES

To: *W. Samuel Tucker, Jr., Secretary, Department of Administration,  
Tallahassee*

#### QUESTION:

Does § 52 of Ch. 69-39, Laws of Florida (§ 665.521, F. S.), hold savings and loan associations free from imposition of taxes?

Your question is answered in the negative. Section 52 of Ch. 69-39, Laws of Florida (§ 665.521, F. S.), states:

No tax may be imposed by the state or any of its political subdivisions on any savings and loan association or its franchise, surplus, deposits, assets, reserves, loans or income which is greater than the least onerous imposed by that state on any other financial institution. (Emphasis supplied.)

It is my opinion the language of § 52, Ch. 69-39, Laws of Florida (§ 665.521, F. S.), is not susceptible to an interpretation which grants the savings and loan association an exemption from taxation. Exemptions are not self-executing. They must be proven by the applicant.

See *Lanier v. Tyson*, 147 So.2d 365.

I am not unmindful of the recent federal court decision regarding immunity of federal banking institutions from state sales and use taxes. See *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U. S. 339, 20 L.Ed 2d 1138, 88 Sup. Ct. 2173 (1968).

In addition, the case of *First National Bank of Homestead v. Dickinson*, Civil Action #1226, Judge Carswell, U. S. Dist. Ct., N. Dist. of Fla., held that the plaintiffs (two national banks), were entitled to refund of documentary stamp tax if they could prove they paid the tax. The Court said, however, that the cost of *documentary* stamps affixed to promissory notes held by the plaintiff banks was paid by the *borrower*. Consequently, in all those situations in which the *borrower* was charged with the cost of the documentary stamp affixed to any promissory note, neither of the plaintiff banks is entitled to a refund.

The same situation exists in connection with intangible taxes on mortgages taken by plaintiff banks.

The *Homestead* case came to issue as a result of §192.54[§196.27], F. S., which states:

All banks, trust companies and Morris plan banks, now or hereafter chartered under the laws of the state, shall have the same immunity from state and local taxation that national banking associations have from time to time under the statutes of the United States.

This section treats all state chartered banks, trust companies, and Morris plan banks like national chartered banks and grants them immunity where the congress has granted them immunity. Savings and loan associations are not to be construed as banks, trust or Morris plan banks for purposes under discussion here.

I hasten to explore further the fact that the tax imposed in the *Homestead* case is a tax upon the borrower or maker even though the institution lending the money could be construed to be federally immune from state taxes.

The Sup. Ct. of Fla. in *Choctawhatchee Electric Cooperative, Inc. v. Green*, 132 So.2d 556, *cert. den.* 7 L.Ed 2d 794, said:

The contention of the petitioner that no documentary stamp tax can be imposed on the promissory notes in this case because §192.06[§196.191], Florida Statutes, F.S.A., precludes the imposition of such a tax on property belonging to the United States, is untenable. The tax here involved is not a property tax. It is an excise tax.

Admittedly, no broad sweeping opinion touching all points can be rendered on this matter. Both court systems leave the matter rather obscure. Congress is presently hearing testimony to clarify the subject matter to the end of removing the immunity of federal institutions from certain taxes. If this is accomplished, then the states will be free to act accordingly.

In *State v. Green*, 173 So.2d 129, the Sup. Ct. of Fla. reviewed three decisions of the U. S. Sup. Ct. that bear most on the consideration of documentary stamp taxes and exempt governmental instrumentalities. These cases are the *Federal Land Bank of New Orleans v. Crosland*, 261 U. S. 374, 43, Sup. Ct. 385, 67 L.Ed. 703; *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 60 Sup. Ct. 15, 84 L.Ed. 11; and *Laurens Federal Savings and Loan Association v. South Carolina Tax Commission et al.*, 365 U. S. 517, 81 Sup. Ct. 719, 5 L.Ed. 2d 749. All the entities were agents of the United States and were exempt from the tax in

question. It follows then that the entity seeking immunity from state taxation must as a matter of fact *be* an agent of the United States or at least an instrumentality of the United States.

The First Agricultural National Bank v. State Tax Commission case, *supra*, recited again the principle of law in the historic case of *McCulloch v. Maryland*, 4 Wheat. 316, that a state tax on The Bank of the United States was unconstitutional. A long line of subsequent decisions by that court has firmly established the proposition that the states are without power, unless authorized by congress, to tax federally created or, as they are presently called, national banks.

It is noted that the Sup. Ct. refused to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities. More importantly, the Court held that the federal instrumentality was immune from both the Massachusetts *use and sales* tax and remained silent as to documentary stamps.

Pragmatically, before a document can be recorded, usually for notice purposes, § 201.01, F. S., requires a documentary stamp tax to be affixed. Section 201.01, F. S., states:

There shall be levied, collected and paid the taxes specified in this chapter, for and in respect to the several documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings, and things described in the following sections, or for or in respect of the vellum, parchment, or paper upon which such document, instrument, matter, writing or thing, or any of them, are written or printed by any person, who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the state. Provided further that the documentary stamp taxes required under this chapter shall be affixed to and placed on all recordable instruments, requiring documentary stamps according to law, *prior to recordation*. On mortgages where the stamps are on the notes, a notation shall be made on the mortgage that the proper stamps and the amount of same have been placed on the notes. (Emphasis supplied.)

See also AGO 062-150, Nov. 8, 1962, Biennial Report of the Attorney General, 1961-1962, p. 616.

It appears, then, unless and until the documentary stamp is purchased and affixed to the document to be recorded, the clerk of the circuit court should refuse to record a document subject to the documentary stamp taxes imposed by Ch. 201, F. S. See AGO 061-188, Dec. 8, 1961, Biennial Report of the Attorney General, 1961-1962, p. 317. It further appears that a person offering such documents for record also has the duty of seeing to it that such documents bear the proper amounts of taxes required.

I am not saying here that a document may be refused by the clerk of the circuit court for recording, but if he determines that the required amount of tax is not affixed, he must notify the department of revenue within 30 days after recording any taxable document, or suffer penalty. See § 201.12, F. S.

In conclusion, savings and loan associations are not free from imposition of state taxes nor can § 52, Ch. 69-39, Laws of Florida (§ 665.521, F. S.), be construed to hold savings and loan associations free from state taxes, the collection of which should be continued as prescribed by law.



069-86—October 14, 1969

## DIVISION OF HEALTH

STATUS OF DIVISION-EMPLOYED PHYSICIANS—MEDICAL  
AND HOSPITAL CARE OF MINORS, CONSENT OF  
PARENTS—REMOVAL OF CERTAIN DISABILITIES  
OF MINORS BY MARRIAGE

To: *James A. Bax, Secretary, Department of Health and Rehabilitative Services, Tallahassee*

## QUESTIONS:

1. Is the status of the physician employed by the division of health different from that of a so-called physician in providing medical care for a minor?

2. Is the written consent valid from a parent or guardian having legal custody of a minor authorizing another adult, into whose care the minor has been entrusted, in giving consent for medical and hospital care for minor?

3. Does a minor become an adult when he or she marries? Is an unwed pregnant minor considered an adult?

The status of physicians and public health officers has been the subject matter of previous opinions of this office in relation to other questions which would answer your inquiry; these opinions are: AGO 058-99, Mar. 19, 1958, Biennial Report of the Attorney General, 1957-1958, p. 600; AGO's 059-31, Feb. 6, 1959, p. 59 and 060-81, Apr. 21, 1960, p. 563, Biennial Report of the Attorney General, 1959-1960 and AGO 061-183, Nov. 14, 1961, Biennial Report of the Attorney General, 1961-1962, p. 310.

The necessity of written consent of a parent or guardian varies with the type of treatment provided. I refer you to letter of Dec. 4, 1968 to Dr. Wilson T. Sowder which treats the question of parental consent necessary under §§ 384.04 and 384.07, F. S.

The words "infant," or "minor," are defined in § 744.03, F. S., as a person under 21 years of age whose disabilities have not been removed by marriage or otherwise according to law. "Guardian," as defined in § 744.03, F. S., has been interpreted as follows:

1. The mother *and* father jointly if living; otherwise the survivor;

2. In case of divorce, the parent or parents to whom custody is awarded; or

3. The guardian appointed either by court or by the last will and testament of the surviving mother or father. See AGO 060-95, May 12, 1960, Biennial Report of the Attorney General, 1959-1960, p. 592.

I also call your attention to Ch. 69-353, Laws of Florida, which amends § 458.16, F. S., requiring doctors who make physical examination to furnish copies of reports upon request to guardians. If a request were made by guardians of the minor for report of the examination conducted under § 384.07, F. S., such report should be provided.

It appears that consent of both parents would be necessary to render such services as are anticipated by you if both parents are living; otherwise, the survivor or the parent to whom custody is awarded or appointed by the court.

Section 743.01, F. S., provides that the disabilities of married male minors are removed by such marriage and specifically provides:

The disability of nonage of all male minors who are married, who have been married, or who may hereafter become married, is removed, and all such persons may assume the management of their estate, contract and be contracted with, sue and be sued, and do and perform any and all acts, matters and things that he could do if he were twenty-one years of age.

Section 743.03, F. S., relates to the removal of the disabilities of female minors through marriage:

The disabilities of nonage of all female minors who are married, who have been married, or who may hereafter become married, including those divorced or hereafter divorced, and those who are or who may hereafter become widows, are removed, and hereafter all such female minors may assume the management of their estate, contract and be contracted with, sue and be sued, and do and perform any and all acts, matters and things that she could do if she were twenty-one years of age.

It should be understood, however, that neither of these sections of the Florida law allows a female, as an example, to be employed by a vendor of alcoholic beverages, *Hunter v. Bullington*, 74 So.2d 673 (1954), and neither would allow a minor male or female, married or single, to vote.

The pregnancy of a minor is not a condition which will automatically cause that minor to become an adult. There is no constitutional, statutory, or common law provision which so provides. As a matter of fact, the opposite position seems to be the case in Florida as outlined in AGO 059-85, Apr. 27, 1959, Biennial Report of the Attorney General, 1959-1960, p. 134, wherein § 741.06, F. S., was the subject matter. Said section provides that a county judge in his discretion may issue a license to marry to any male or female under 21 years under certain conditions, one being that they are the parents or expectant parents of a child. The opinion is quoted in part for the purpose of specifically outlining your inquiry.

These sections, when considered in the light of the above authorities, lead but to the conclusion that the legislature intended to create an exception to the prohibition against the issuance of marriage licenses to minors where said minors were the parents or expectant parents of a child. They appear to have authorized the issuing county judge to exercise his sound discretion in licensing such persons to marry. Any other construction placed on these sections would result in the absurdity, and perhaps an unconstitutional denial of equal protection of the laws, in that minors below the ages set forth in § 741.06[, F. S.] who were parents or expectant parents could be licensed to marry; while minors under the same circumstances below the age of 21 years, but over the ages defined in the statute, could not be so licensed.

Therefore, in answer to your questions, the status of a physician employed by the division of health of the department of health and rehabilitative services is different from that of a so-called private physician in providing medical care for a minor in many different ways as outlined by the noted Attorney General's opinions. The written consent from parents or parent or guardian is necessary under some conditions and not under others, depending upon whether the treatment is a compulsory procedure as distinguished from a type of treatment

rendered to the particular person rather than required to control contagion. When written consent is necessary it would appear consent of both parents would be necessary if both parents are living; in case of divorce the parent or parents to whom custody is awarded or the guardian appointed by the court, or the last will and testament of the deceased mother or father.

A minor does not become an adult when married, but certain disabilities of nonage are removed by marriage. An unwed pregnant minor is not considered an adult.

069-87—October 16, 1969

**COMPENSATION OF COUNTY OFFICIALS  
EXTRA COMPENSATION BY SPECIAL ACT FOR THE  
CHAIRMAN OF THE BOARD OF COUNTY COM-  
MISSIONERS**

To: Carter A Bradford, County Attorney, Orlando

**QUESTION:**

May a chairman of a board of county commissioners receive extra compensation under special legislation in light of the provisions of Ch. 69-211, Laws of Florida?

Chapter 69-211, Laws of Florida (§ 145.16(2)(a), F. S.), enacted by a three fifths vote during the 1969 session of the legislature, provides in part that:

Pursuant to § 11(a)(21), Art. III of the state constitution, the legislature hereby prohibits special laws or general laws of local application pertaining to the compensation of the following county officials:

(a) Members of the board of county commissioners. . . .

At the outset it should be noted that the act pertains only to members of boards of county commissioners and is silent as to its application to chairmen of said boards. In addition Ch. 69-211, Laws of Florida, contains no general repealer section and does not appear to repeal any previous local or general statutes. Unless the language of a statute clearly gives it a retrospective application, it is presumed to be prospective only in its operation. See *State ex rel. Bayless v. Lee*, 156 Fla. 494, 23 So.2d 575, and *State ex rel. Riverside Bank v. Green*, Fla., 101 So.2d 805.

Another established rule of statutory construction is to construe all acts of the legislature in *pari materia*. See *State ex rel. McClure v. Sullivan*, Fla., 43 So.2d 438, *Sanders v. State ex rel. Shamrock Properties*, Fla., 46 So.2d 491, and *Okaloosa Co. Water and Sewer Dist. v. Hilburn*, Fla., 160 So.2d 43. In this instance, § 9, Ch. 69-346, Laws of Florida, adding § 145.131, F. S., provides that:

All local or special laws or general laws of local application enacted prior to July 1, 1969, which relate to compensation of county officials are repealed, except laws pertaining to travel expenses of county officers or to payment of extra compensation to the chairmen of boards of county commissioners . . . .  
(Emphasis supplied.)

Since Ch. 69-211, Laws of Florida, does not mention chairmen of county commissions, does not repeal any preexisting local acts authorizing supplemental compensation for county commission chairmen and must be read in *pari materia* with Ch. 69-346, Laws of Florida, it

appears where properly authorized by existing local act, a county commission chairman would be entitled to receive supplemental compensation for extra services rendered as chairman. These observations appear consistent with the comments set out in answer to the third question presented in AGO 069-68 and that opinion is not superseded or modified by AGO 069-80 of this publication.

Conditioned upon the above and foregoing, your question is answered in the affirmative.

069-88—October 16, 1969

**COUNTY COMMISSIONERS' DISTRICTS  
MANDATORY REDISTRICTING—CONSTRUCTION OF  
ART. VIII, § 1(e), STATE CONST.**

To: *Robert D. Sumner, County Attorney, Dade City*

**QUESTION:**

Is it mandatory for the board of county commissioners to redistrict the county prior to the 1970 census in the light of the provisions of Art. VIII, § 1(e), State Const.?

Article VIII, § 1(e), State Const., provides in part:

... After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. . . .

Constitutional and statutory provisions are generally construed to be prospective unless there is a clear indication to the contrary in the language of the act in question. See *State ex rel. Bayless v. Lee*, 156 Fla. 494, 23 So.2d 575. This being the case, it would appear that the section in question should become operative following the next census which will be taken in 1970. See § 11.031, F. S.

The reference in your letter to § 124.01(3), F. S., has been noted. However, it does not appear to be in conflict with the constitutional provision in that it requires only county commissioners to redistrict counties "from time to time" and then only in the odd-numbered years. This statutory provision would not require any mandatory redistricting in 1969.

069-89—October 16, 1969

**ELECTION CODE  
ELECTIONS—POLITICAL CONTRIBUTIONS  
BY HOLDERS OF JAI ALAI PERMITS**

To: *Tom Adams, Secretary of State, Tallahassee*

**QUESTION:**

Is a person holding a jai alai license or permit eligible to make political contributions to candidates for public office in light of the provisions of § 99.161(1)(a), and 104.27, F. S.?

Section 99.161(1)(a), F. S., prohibits those persons holding horse or dog racing licenses or permits from contributing to candidates for public office. This section is silent as to any restrictions concerning political contributions by those holding jai alai permits, and since no other section of the election code prohibits political contributions by the holders of jai alai permits or licenses, it would appear that the holders of those pari-mutuel licenses are not prohibited from contributing to



political campaigns.

While it appears that policy considerations which prohibit contributions from persons holding horse or dog racing licenses should apply to persons holding jai alai permits, this is a matter for legislative determination. Accordingly, your question as set out above is answered in the affirmative.

069-90—October 17, 1969

**STATE OWNED LANDS  
PROCEEDS FROM SALE—STATE SCHOOL TRUST  
FUND**

*To: Floyd T. Christian, Commissioner of Education, and James A. Phorp, Executive Director, Board of Trustees of the Internal Improvement Trust Fund, Tallahassee*

**QUESTIONS:**

1. Are the trustees of the internal improvement trust fund authorized to pay any portion of the proceeds of sale of any state owned lands to the state school trust fund?

2. If your answer to the first question is in the affirmative, please advise whether that authority extends to the proceeds from the sale of all state lands?

Your first question is answered in the affirmative.

The trustees of the internal improvement trust fund, now denominated the state of Florida board of trustees of the internal improvement trust fund, Ch. 69-106, Laws of Florida (§ 20.27, F. S.), hold title to all lands owned by the state and may sell same, § 253.03, F. S. The distribution of 25% of the proceeds from the sale of state owned lands to the state school trust fund is authorized and required by Art. XII, § 4, State Const. of 1885 (now a statute [§ 228.151, F. S.], by operation of Art. XII, § 10, State Const. as revised, 1968) and § 270.12, F. S., in the following language.

Article XII, § 4, State Const. of 1885, now a statute [§ 228.151, F. S.], provides, in pertinent part:

The State School Fund . . . shall be derived from the following sources. . . Twenty[-]five per cent of the sales of public lands which are now or may hereafter be owned by the State.

Section 270.12, F. S., a subsequent enactment, provides:

The board of trustees of the internal improvement trust fund shall, pursuant to constitutional provision, set aside and pay into the state school trust fund twenty-five per cent of the proceeds derived from the sale of all state lands vested in said board of trustees.

Later in time, the Sup. Ct. of Fla. defined the term "public lands," as employed in Art. XII, § 4, State Const., [1885], to include swamp and overflowed lands and internal improvement lands, but to be exclusive of certain other state lands, to wit: Sovereignty lands and Murphy Act lands, *State v. Holland* (Fla. 1942) 10 So.2d 577, the totality of which constituted all state lands.

Still later, in 1967, the legislature, with presumptive knowledge of the law, *Collins Invest. Co. v. Metropolitan Dade County* (Fla. 1964) 164 So.2d 806, *reh. den.*; *Foley v. State* (Fla. 1951) 50 So.2d 179, reconstituted Ch. 253, F. S., to declare the trustees of the internal improvement trust fund vested with title to all "state lands." Section

253.03, F. S.

Indeed, consonant with these legislative progressions and refinements and with the judicial definition noted above, the administration of all state land sales effected a distribution by the trustees to the state school trust fund of 25% of the proceeds therefrom. That distribution, merely one indication of the statutorily recognized symbiosis of trustees' revenues and educational benefit—viz: §§ 253.51, F. S., *et seq.*; oil and mineral estates by reservation; §§ 270.12, F. S., *et seq.*, *inter alia.*—has been operative all the while, over these many years, until just nineteen months ago. Interestingly, in these last nineteen months there has eventuated neither statutory change by the legislature, nor contrary judicial decree by the courts, nor a contrary vote of the trustees. Accordingly, your second question is answered in the affirmative.

069-91—October 17, 1969

#### PUBLIC MONEY

#### WASHINGTON OFFICE OF FEDERAL PROGRAMS COORDINATOR—TRANSFER OF SPECIFIC DEPARTMENTAL LEGISLATIVE APPROPRIATIONS TO MAINTAIN-CONSTRUCTION OF § 216.292, F. S.

To: W. Samuel Tucker, Jr., Secretary, Department of Administration, Tallahassee

#### QUESTION:

May \$30,000 in legislative appropriations to two departments and one division of the department of administration be lawfully transferred to fund the governor's Washington, D. C. office—federal programs coordinator?

As proposed by you on the administration commission's agenda, Item 2(b), of October 14, 1969, you would effect the following transfers:

1. Department of health & rehabilitative services—division of family services:  
Salaries, retirement and social security matching  
1 598 0101 06 1 \$ (10,000)
2. Department of transportation—salaries, retirement and social security matching  
1 550 0101 05 1 (15,000)
3. Department of administration—general administration:  
Salaries, retirement and social security matching  
1 511 0801 01 1 19,600  
0804 01 1 10,400
4. Bureau of budgeting:  
Salaries, retirement and social security matching  
1 511 0101 01 1 (5,000)

The Washington, D. C., office to be funded thereby would operate separate and apart from the state's twelve congressional and two senatorial offices in the capitol and would assist in the coordination of programs at the federal level.

The legislative power, to which the power to appropriate the people's money is integral and exclusive, is resident in the legislature alone. Article III, § 1, State Const. Accordingly, authorization *vel non* of the proposed funding must be determined by divination of the legislative intent resident in the controlling statutes. *Ervin v. Peninsular Telephone Co. (Fla.) 53 So.2d 647; Smith v. Ryan (Fla.) 39 So.2d 281, inter alia.*

The legislative intent is stated generally in and by the appropriations act of 1969 (§ 1, Ch. 69-100, Laws of Florida), the items of which you seek to have adjusted. That act provides: "The moneys in the following items are appropriated from the named funds for the 1969-70 fiscal year to the state agency indicated . . ."

Specifically, § 31(4)(u)8.a., Ch. 69-106, Laws of Florida, the Governmental Reorganization Act of 1969 (§ 216.292(1), F. S.), provides:

Unless otherwise expressly provided by law, appropriations shall be expended only for the purpose for which appropriated, except that if deemed necessary said moneys may, upon approval of the commission, be transferred *within* the particular state agency affected as provided in subsection (4)(u)8b [§ 216.292(2), F. S.] when it is determined to be in the best interests of the state; *provided, however, that . . . appropriations shall not be transferred between state agencies or programs unless specifically authorized by law.* (Emphasis supplied.)

I note, therefore, that the said subsection (4)(u)8b., 1., Ch. 69-106, Laws of Florida, (§ 216.292(2), F. S.), would permit intraagency transfers from "salaries, retirement and social security matching" to "other personal services" if deemed necessary by the administration commission—which seemingly relates to the transfer of \$5,000 from bureau of budgeting. But it remains to be determined if the proposed transfers from the departments of transportation and health and rehabilitative services are "specifically authorized by law." § 31(4)(u)8.a., Ch. 69-106, Laws of Florida (§ 216.292(1), F. S.).

You have suggested that § 16, Ch. 69-100, Laws of Florida, constitutes such specific authorization by allowing for exemption from the provisions of § 282.061, F. S., predecessor to § 31(4)(u)8.a. of the government reorganization act. Yet, § 16, Ch. 69-100, Laws of Florida, the appropriations act only exempts from § 282.061, F. S., necessary adjustments which are both *required* by the reorganization act and omitted by the appropriations act—and even then, only to accomplish the purposes of such reorganization.

Clearly, the reorganization act neither created nor contemplated, even inferentially, the creation of, a Washington, D. C., office by the secretary. An interagency transfer of funds for that purpose is *not*, as a reading of Ch. 69-106, Laws of Florida, unblinkingly reveals, "specifically authorized by law."

069-92—October 22, 1969

### CRIMINAL PROCEDURE

#### PAYMENT OF PER DIEM AND MILEAGE EXPENSES OF COURT-APPOINTED ATTORNEYS IN CAPITAL CASES—CONSTRUCTION OF § 909.21, 27.51(1), 27.53, 27.54, AND 112.061, F. S.

To: Claude R. Edwards, Circuit Judge, Orlando

#### QUESTIONS:

1. When the court appoints counsel for an insolvent defen-

dant in a capital case pursuant to § 909.21, F. S., and a change of venue is granted and trial takes place in another county, does the court have authority to order payment to the appointed defense counsel of per diem and mileage under § 112.061, F. S., for travel to the county to which the venue was changed?

2. If the court does not have authority under § 909.21, F. S., to pay appointed defense counsel per diem and mileage in accordance with § 112.061, F. S., would the court have authority to pay per diem and mileage if the defense counsel are appointed special assistant public defenders *nunc pro tunc* under §§ 27.53(2) and 27.54, F. S.?

3. If the court has authority to pay per diem and mileage to the appointed defense counsel as special assistant public defenders, then, would this in any way affect the previously entered order of the court paying the appointed defense counsel attorneys' fees under § 909.21, F. S.?

4. If the court has the authority to pay per diem and mileage to appointed defense counsel in capital cases, would the payment of such per diem and mileage be properly made from the general fine and forfeiture fund?

All of the comments hereinafter made will relate only to mileage and per diem for travel to the county to which the venue was changed in order to try the case in that county. Said remarks will have nothing to do with necessary travel by counsel appointed under § 909.21, F. S., in the investigation and preparation of the case *for trial*.

#### AS TO QUESTION 1:

First, I observe that § 909.21, F. S., does not authorize the payment of per diem and mileage to attorneys appointed under its authorization. It authorizes no payment except for the services of the attorneys and for "The cost of investigation and preparation of the case for trial" which does not include per diem and mileage.

As to § 112.061, F. S., it authorizes the payment of per diem and mileage only to public officers, public employees or "authorized persons." These terms are defined by subsection (2)(c),(d), and (e) of said section as follows:

(2) DEFINITIONS.—For the purposes of this section the following words shall have the meaning indicated:

\* \* \* \* \*

(c) Officer or public officer—An individual who in the performance of his official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the governor and has jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor.

(d) Employee or public employee—An individual, whether commissioned or not, other than an officer or authorized person as defined herein, who is filling a regular or full-time authorized position and is responsible to an agency head.

(e) Authorized person—

1. A person other than a public officer or employee as defined herein, whether elected or commissioned or not, who is authorized by an agency head to incur travel expenses in the performance of his official duties, or



2. A person who is called upon by an agency to contribute time and services as consultant or advisor, or

3. A person who is a candidate for an executive or professional position.

An attorney appointed under § 909.21, F. S., is not a public officer because he is neither elected by the people nor commissioned by the governor. Such an attorney is not a public employee because he does not fill a regular or a full-time authorized position.

The attorneys appointed under § 909.21, F. S., are not authorized persons because they are not authorized by an agency head to incur travel expenses in the performance of their official duties; they are not called upon by an agency to contribute time and services as consultants or advisers; and they are not candidates for executive or professional positions. Therefore, the attorneys so appointed by you cannot legally be paid per diem and mileage under § 112.061, F. S.

#### AS TO QUESTION 2:

Section 27.51(1), F. S., authorizes the appointment of the public defender to represent insolvent defendants charged with capital offenses as well as with other felonies. However, it gives the court the option to appoint counsel for insolvent defendants in capital cases under the provisions of § 909.21, F. S., as appears from the following provision of § 27.51(1), F. S.: "... Nothing herein contained shall prevent the trial court from appointing private counsel in capital cases as provided in § 909.21...."

When the trial court exercises this option by appointing private counsel under § 909.21, F. S., that statute governs as to payments which may be made to such counsel, to the exclusion of § 27.53(2), F. S., which authorizes the court to appoint private counsel as special assistant public defenders and to set fees for them, and to the exclusion of § 27.54, F. S., which validates payments by a county of expenses of a public defender's office and provides that travel expenses shall be paid in accordance with § 112.061, F. S.

Since the attorneys mentioned by you were appointed as private counsel under § 909.21, F. S., and have completed their tasks without ever having been appointed as special assistant public defenders, I do not think that there is any authority for the entry of a nunc pro tunc order appointing them special assistant public defenders at this late time. The rule as to when a nunc pro tunc order may be entered was aptly stated by the Sup. Ct. of Fla. in *Dunkle v. State*, 124 So. 725-726, as follows:

The rule appears to be, and we so hold, that a judgment nunc pro tunc presupposes a judgment actually rendered at the proper time, but not entered, and it is a general rule that a judgment nunc pro tunc cannot regularly be entered unless such judgment has been in fact previously rendered....

And again in *Freeman v. Blackburn*, 92 So.2d 262, 263, said Sup. Ct. stated: "... The purpose of a nunc pro tunc order is to supply an omission in the record of action previously done which omission was made through inadvertence or mistake...." So it appears that a nunc pro tunc order appointing said attorneys as special assistant public defenders would not be authorized by law.

#### AS TO QUESTION 3:

This question does not require an answer because the court does not have authority to pay per diem and mileage to said defense counsel as special assistant public defenders.

#### AS TO QUESTION 4:

This question does not require an answer because the court does not have authority to pay per diem and mileage to counsel appointed in a capital case under § 909.21, F. S.

069-93—October 27, 1969

**PUBLIC SCHOOL PUPILS—WRITTEN EXCUSES  
ON ACCOUNT OF ILLNESS**

**TERM "LICENSED PRACTICING PHYSICIAN" CONSTRUED TO  
INCLUDE CHIROPRACTIC PHYSICIAN**

To: *E. M. Saunders, D. C., President, Board of Chiropractic Examiners,  
Fort Myers*

**QUESTION:**

Should a licensed practicing chiropractic physician be considered a licensed practicing physician within the intendment of § 232.09(4), F. S.?

The practice of chiropractic has been a recognized and regulated branch of the healing arts in this state since 1923 (see Ch. 9330, Laws of Florida, 1923, now appearing as Ch. 460, F. S.). This was long before the adoption of the Florida school code of 1939 (Ch. 19355, Laws of Florida, 1939), containing the compulsory school attendance provisions here in question. As stated in *Foster v. Thornton*, 113 Fla. 600, 152 So. 667, in an opinion rendered in 1934, also before the adoption of the provision here in question:

The chiropractic method of treatment of human beings for the cure of ills and ailments is recognized by the laws of the state of Florida, and those who practice that method of treating human beings are granted certificates and license to practice that method of treatment, just as physicians of other schools who practice other methods of treatment are granted certificates and license to practice the treatment of ills and ailments according to the methods of other schools.

Chiropractors have been recognized as "registered," "licensed," or "qualified" physicians within the intendment of various statutes of this state, in opinions heretofore rendered by this office. Thus, it has been held that chiropractors are "qualified physicians or surgeons" within the meaning of the medical treatment provisions of the workmen's compensation act, § 440.13, F. S., see AGO 041-166, Mar. 25, 1941, Biennial Report of the Attorney General, 1941-1942, p. 572, and AGO 064-11, Jan. 17, 1964, Biennial Report of the Attorney General, 1963-1964, p. 263; that they are "practicing physicians and surgeons" entitled to exemption from jury duty under § 40.08(2), F. S., see AGO 067-51, Aug. 10, 1967, Biennial Report of the Attorney General, 1967-1968, p. 83; and that they are "registered licensed physicians" within the meaning of § 509.221, F. S., and thus authorized to issue health certificates to waiters, waitresses and food handlers as required by that statute. Note also that in AGO 048-162, May 10, 1948, Biennial Report of the Attorney General, 1947-1948, p. 580, holding that a licensed naturopath could perform the premarital physical examination required by § 741.051, F. S., it was stated that the expression "duly licensed physician" as used in § 741.051, F. S. "is not qualified, confined or limited to the physician practicing any particular branch of the healing arts."

It cannot be said, therefore, that the use of the words "licensed practicing physician" indicated clearly and unequivocally a legislative

intent to confine the writing of school excuses exclusively to licensed practicing doctors of medicine. This being so, the statute must be construed in accordance with the well-settled rule that where the meaning of a statute is at all doubtful, the law favors a rational, sensible construction. *Realty Bond and Share Company v. Englar*, (Fla. 1932) 143 So. 152. A logical and practical intent should be ascribed to every legislative act. *Silver Sands of Pensacola Beach, Inc. v. Pensacola Loan and Savings Bank*, Fla. App. 1965, 174 So.2d 61. A statute should not be construed to bring about an unreasonable or absurd result, but rather to effectuate the obvious purpose and objective of the legislature. *George v. State*, Fla. App. 1967, 203 So.2d 173.

To hold that the legislature intended to limit the writing of school-attendance excuses on account of sickness and injury solely to licensed practicing doctors of medicine could result in this situation: The parents of a schoolchild being treated by a chiropractor for a disabling ailment that the chiropractor is qualified by training and experience, and authorized by statute, to treat would, nonetheless, be required to go to the trouble and expense of taking the child to a licensed practicing doctor of medicine for the sole purpose of obtaining a written statement that the child is unable to attend school on account of such ailment. There is nothing in the statute to indicate that the legislature intended such an unreasonable result.

It was the obvious purpose and intent of the legislature to require some professional medical evidence that a child was actually suffering from a disabling ailment before the child could be excused from school. The written statement of the attending chiropractic physician would serve this purpose equally well, if not better, than that of a nonattending doctor of medicine who examines the child only for the purpose of certifying to the disability in compliance with such a statutory requirement; and the only sensible and reasonable interpretation of the statute is that the attending chiropractic physician may certify that it is impracticable or inadvisable for the child to attend school without the necessity of obtaining a separate statement from a doctor of medicine. Accordingly, your question is answered in the affirmative.

069-94—October 27, 1969

#### GOVERNOR

#### AUTHORITY TO SUSPEND MUNICIPAL OFFICERS— § 112.317, F. S., AND ART. IV, § 7, STATE CONST., 1968

To: *Claude R. Kirk, Jr., Governor, Tallahassee*

#### QUESTION:

Assuming specific facts are presented to the governor reflecting a violation by municipal officials of the provisions of Ch. 112, F. S., does the governor have the power, under this chapter and, in particular, under the provisions of Ch. 69-335, Laws of Florida, to suspend municipal officers if the governor determines that the law has been violated?

Chapter 67-469, Laws of Florida (appearing as §§ 112.311-112.318, F. S.), adopted a broad and comprehensive code of ethics setting forth standards of conduct for state officers and employees in the performance of their duties. By an amendment adopted in 1969 (Ch. 69-335, Laws of Florida) these standards of conduct were made applicable also to city and county officers and employees. While the statute designates the officials to whom a complaint concerning a violation shall be made,

it does not purport to confer upon such officials any power of suspension or removal in addition to that which might be held by such official under other applicable provisions of law. On the contrary, it is specifically provided by § 112.317, F. S., that a violation of any provision of the part "...shall constitute grounds for dismissal from employment, or removal from office, or other penalty as provided by law." (Emphasis supplied.)

Your authority to suspend municipal officers must, then, be found in other applicable provisions of law. Prior to the adoption of the 1968 State Const., the governor had no power of suspension or removal over municipal officers, as such officers were not within the contemplation of Art. IV, § 15, State Const. of 1885, authorizing the governor to suspend "All officers that shall have been appointed or elected, and that are not liable to impeachment..." for the named misfeasances or malfeasances in office. See *In re Opinion of the Justices*, 1935, 121 Fla. 157, 163 So. 410. The 1968 State Const. does, however, confer upon the governor some power of suspension over municipal officers, authorizing him to suspend from office an elected municipal officer indicted for crime and to fill the office by appointment for the period of suspension, not to extend beyond the term, "...unless these powers are vested elsewhere by law or the municipal charter." Article IV, § 7, State Const. of 1968. This particular section of the new State Const. appears to contain the sole authority of the governor respecting the suspension or removal of municipal officers.

Accordingly, your question is answered in the negative.

069-95—October 28, 1969

#### COUNTY PUBLIC SCHOOLS

#### SCHOOL TAX AREAS WITHIN SCHOOL DISTRICT— CONSTRUCTION OF § 230.23(11)(d), F. S.

To: *John Broxson, Chairman, Public Schools Subcommittee, Florida Senate, Gulf Breeze*

#### QUESTION:

Does the State Const. as revised in 1968 prohibit the creation of tax areas as provided in § 230.23(11)(d), F. S.?

Section 230.23(11)(d), F. S., has been amended by § 30 of Ch. 69-216, Laws of Florida, to conform to provisions of the new State Const. It prescribes a procedure by which a district school board, in counties having less than 150,000 population, may create tax areas within the district for "...building, repairing or making additions to school buildings and equipment in said area, within the limits of § 12, Art. VII of the state constitution [1968], and thereafter call an election within and under the requirements of said § 12, Art. VII to determine whether or not bonds shall be issued for the purpose of financing same..." to be paid by an ad valorem tax on property within the area. Further provisions are:

... For the purpose of this law tax areas herein provided for are defined as being special tax school districts... and the creation of tax areas as herein provided shall not be held to alter or disturb the present one school district for administrative and district school tax purposes....

On consideration of this functional distinction I conclude that the provision of the new constitution, Art. IX, § 4, that "Each county shall constitute a school district;..." does not prohibit creation of special



tax school districts for funding of capital projects covered by § 230.23(11)(d), F. S. The levy authorized by this section for payment of bonds is also unaffected by millage limitations under Art. VII, § 9(b), because of the express language of that section restricting its provisions to taxes "exclusive of taxes levied for the payment of bonds." Cf. AGO's 069-41, 069-47, and 069-51 of this publication.

The clear import of the revision of the law by Ch. 69-216, Laws of Florida, is to eliminate application of Art. XII, § 17, of the former State Const. in future operations under this law and to substitute the mandates of Art. VII, § 12, of the new State Const., which so far as here applicable states:

SECTION 12. . . . [S]chool districts . . . may issue bonds . . . payable from ad valorem taxation . . . only:

(a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation . . . .

Assuming compliance with this section, I find no other direct constitutional restraint against action authorized under § 230.23(11)(d), F. S., as amended.

069-96—October 28, 1969

#### STATE OFFICERS AND EMPLOYEES

#### REIMBURSEMENT FOR TRAVEL PERFORMED BY USE OF PRIVATE PLANE—§ 112.061(7)(a),(d),(e), and (h), F. S.

To: *Randolph Hodges, Executive Director, Department of Natural Resources, Tallahassee*

#### QUESTION:

Is the department of natural resources authorized by law to reimburse for mileage at 10¢ per mile for travel expenses on official business to a member of its staff when he or she uses a privately-owned, operated, and maintained plane?

In connection with the question asked, you stated that it has been the procedure of the department of natural resources to authorize reimbursement to the specific employee while using his privately-owned plane for official business on the same basis that § 112.061, F. S., provides for employees when using their privately-owned automobiles. You also state that in making such authorization the department has considered the time factors involved, as well as the fact that other employees often travel with him without additional travel costs to the state.

The authority of the department of natural resources is contained in § 112.061(7)(a),(d),(e), and (h), F. S. For convenience, excerpts from the mentioned statutory guidelines are set forth herein:

#### (7) TRANSPORTATION.—

(a) All travel must be by a usually traveled route. In case a person travels by an indirect route for his own convenience any extra costs shall be borne by the traveler and reimbursement for expenses shall be based only on such charges as would have been incurred by a usually traveled route. The agency head shall designate the most economical method of travel for each trip, keeping in mind the following conditions:

1. The nature of the business.

2. The most efficient and economical means of travel (considering time of the traveler, cost of transportation and per diem or subsistence required).

3. The number of persons making the trip, and the amount of equipment or material to be transported.

\* \* \* \* \*

(d) 1. The use of privately-owned vehicles for official travel in lieu of public-owned vehicles or common carrier may be authorized by the agency head if a public-owned vehicle is not available. Whenever travel is by privately-owned vehicle, the traveler shall be entitled to a mileage allowance at a fixed rate not to exceed ten cents per mile or the common carrier fare for such travel, to be determined by the agency head. . . . [E]xcept as provided in subsection (8) of this section.

2. All mileage shall be shown from point of origin to point of destination and when possible shall be computed on the basis of the current map of the department of transportation. Vicinity mileage necessary for conduct of official business is allowable but must be shown as a separate item on the expense voucher.

(e) Transportation by chartered vehicles when traveling on official business may be authorized by the agency head when necessary or where it is to the advantage of the agency, provided the cost of such transportation does not exceed the cost of transportation by privately-owned vehicle pursuant to paragraph (d) of this subsection.

\* \* \* \* \*

(h) No traveler shall be allowed either mileage or transportation expense when he is gratuitously transported by another person, or when he is transported by another traveler who is entitled to mileage or transportation expense.

You are advised that the head of the department of natural resources is specifically authorized to approve the use of a privately-owned vehicle *if a publicly-owned vehicle is not available*. Availability as used in connection with your question has reference to the availability of a publicly-owned airplane. If such is unavailable, the use of a privately-owned airplane may be approved subject to the limitations specified above. (Emphasis supplied.)

In making a determination of the most economical method of travel, as a condition to giving approval, the department of natural resources will, of course, be governed by the requirement that the travel be over the most direct route usually traveled. The computation shall be made at a fixed rate not to exceed 10¢ per mile by use of the current map of the department of transportation without any allowances for another authorized traveler who may at a given time be traveling with the employee who uses his privately-owned airplane.

This opinion is not contrary to that rendered in AGO 066-63, June 23, 1966, Biennial Report of the Attorney General, 1965-1966, p. 324, which involved the use of a chartered vehicle by a county school board.

069-97—October 28, 1969

## PUBLIC OFFICERS

CONTRACTS FOR PUBLIC WORKS—PROHIBITED  
INTEREST—§ 839.07, F. S.*To: Richard E. Gerstein, State Attorney, Miami*

## QUESTION:

Does a contract providing for the leasing, including maintenance, of police cars to a city constitute a contract for the performance of a "public work" within the intendment of § 839.07, F. S.?

Section 839.07, F. S., prohibits state or local officials from bidding on, entering into, or being in any way interested in, a contract for the performance of certain designated types of public works "... or for the performance of any other public work in which the said officer was a party to the letting ..."

Contracts such as you describe in your question would be void if entered into by the city with a member of the city commission or with a partnership, corporation, or other business entity in which a city commissioner had an interest. Since such contracts are contrary to public policy, they are held to be void regardless of whether or not they are within the intendment of a statute such as § 839.07, F. S., which is said to be declaratory of the common law and the time-honored principle that one cannot serve two masters. See *Lainhart v. Burr*, 1905, 49 Fla. 315, 38 So. 711; *City of Leesburg v. Ware*, 113 Fla. 760, 153 So. 87, 90; *City of Coral Gables v. Coral Gables, Inc.*, 119 Fla. 30, 160 So. 476; *Town of Boca Raton v. Raulerson*, 108 Fla. 376, 146 So. 576; *City of Stuart v. Green*, 156 Fla. 551, 23 So.2d 831; *Watson v. City of New Smyrna Beach*, Fla. 1956, 85 So.2d 548; *Hooten v. Lake County*, Fla. App.1965, 177 So.2d 696.

Thus, the only real question presented is whether or not a contract such as you describe would, in the circumstances hypothesized above, be subject to the criminal sanctions imposed by § 839.07, F. S.

The "conflict of interest" statute in question, § 839.07, F. S., denounces specifically a public official's bidding on, entering into, or being in any way interested in, "a contract for the working of any public road or street, the construction or building of any bridge, the erecting or building of any house, or ... the performance of any other public work in which the said officer was a party to the letting ...". In *State v. Hooten*, Fla. App.1960, 122 So.2d 336, it was held that the sale of land to the county for use as a county barn site subjected a county commissioner who had an interest in the land to the criminal penalty imposed by § 839.07. In so holding the appellate court noted that the term "public works" has been defined as "all fixed works constructed for public use, such as railways, docks, canals, waterworks, roads, and the like." It was further noted that "there is no contention that the purchase of the land for a county barn site was not for the performance of a public work for the county." The court concluded that the sale of land for the purpose of constructing a county barn—a fixed public improvement or "work"—was within the intendment of the criminal sanctions of the statute.

The decision in the *Hooten* case does not, therefore, necessarily stand for the proposition that "public works" or "public works activities" include all public activities of a political subdivision, of whatever kind; and it would seem that, under the rule of statutory construction that penal statutes must be strictly construed, as well as the principle of

*ejusdem generis*, the appellate court intended only to hold that "public works activities" of the same general kind as those specifically designated in the statute were within its purview. This being so, its decision cannot be relied upon as authority for construing the statute in question as applying to a contract such as that here in question—one that cannot, by any stretch of the imagination, be construed as a "public works activity" of the kind contemplated by the act. Research has revealed no other decision of the courts or an opinion of this office tending to hold that such a contract could be construed as "public works" or "public works activity" within the intentment of § 839.07, F. S.

Accordingly, you are advised that we can find no authority for saying that the leasing and maintenance of automobiles for the performance of a governmental function of the city is "any other public works" within the meaning and intent of § 839.07, F. S., and the criminal sanctions thereby imposed.

No opinion is expressed as to whether or not such a contract would be within the intentment of § 839.09, F. S., the penalty of which appears to be the same as that prescribed in § 839.07, F. S. See AGO 053-164, July 20, 1953, Biennial Report of the Attorney General, 1953-1954, p. 655, holding that members of the board of commissioners of the Everglades Fire Control District would be subject to criminal prosecution under § 839.09, for purchasing a jeep truck from a company owned by a board member. Cf. AGO 058-146, Apr. 24, 1958, Biennial Report of the Attorney General, 1957-1958, p. 665, holding that "the purchasing of parts, service, maintenance, etc., for automobiles" is comprehended by § 839.08, F. S., (prohibiting a state or county officer from purchasing supplies or materials for public use from himself or from any firm or corporation in which he is interested) and that an automobile purchase and maintenance contract between the sheriff and an automobile agency owned by him is void under the statute as well as public policy.

069-98—October 29, 1969

#### TAXATION

#### LIMITATION OF MILLAGE, COUNTIES—CONSTRUCTION OF ART. VII, § 9(a), STATE CONST., AND § 193.321[§ 200.071], F. S., AS THEY APPLY TO § 135.01 AND 150.08, F. S.

To: George H. Bailey, County Attorney, West Palm Beach

#### QUESTION:

Should the millage authorized by Chs. 135 and 150, F. S., be included in calculating the millage limitation referred to in § 193.321[§ 200.071], F. S.?

Your question is answered in the affirmative.

Section 193.321[§ 200.071], F. S., excludes only "special benefits and debt service on obligations issued in connection therewith." For the reasons stated in AGO 069-22 of this publication and AGO 068-85, July 23, 1968, Biennial Report of the Attorney General, 1967-1968, p. 299, this language excludes only special assessments (as distinguished from ad valorem taxes) and debt service on obligations issued in connection with special assessments. It does not exclude all millage for "debt service on obligations issued with the approval of . . . taxpayers," as provided by § 167.441[§ 200.081], F. S., for municipal millage limitations.

The levies authorized by § 135.01, F. S., for public buildings and by



§ 150.08, F. S., for public libraries are not special assessments measured by or directly related to enhancement of the value of the property taxed, as required by decisions reviewed in the opinions above cited. The levies are therefore not excluded from the millage limitation imposed by § 193.321[200.071], F. S.

Although these taxes are authorized by general law within the terms of Art. VII, § 9(a) of the State Const., such authorization does not prevent application of statutory limitations imposed by other general law, § 193.321[§ 200.071], F. S., to the extent that the existing general law is consistent with the new State Const. See AGO 069-71, this publication.

069-99—October 30, 1969

### NONCHARTER COUNTY GOVERNMENT

#### CONSTRUCTION OF ART. VIII, § 1(f) AND 6(d), STATE CONST., AS TO THE REPEAL OF SPECIAL LAWS BY COUNTY ORDINANCE

To: James T. Norton, County Attorney, Green Cove Springs

#### QUESTION:

May a county repeal special laws by county ordinance under the home rule provisions of the 1968 State Const.?

Since no counties are known to have adopted a charter form of government under the provisions of Art. VIII, § 1(g), State Const. of 1968, it is assumed for the purpose of this opinion that we are dealing with a noncharter county under the provisions of Art. VIII, § 1(f), State Const.

Article VIII, § 1(f), State Const., provides in part:

... The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, *county ordinances not inconsistent with general or special law* . . . . (Emphasis supplied.)

The "general law" referred to in the above-quoted constitutional provision was enacted during the 1969 Session of the legislature as Ch. 69-32, Laws of Florida (§ § 125.66-125.68, F. S.). The procedure for enacting county ordinances is set out in that act.

Article VIII, § 6(d), State Const. provides: "... Local laws relating only to unincorporated areas of a county *on the effective date of this article* may be amended or repealed by county ordinance. . . ." (Emphasis supplied.)

A special law is defined in Art. X, § 12(g), State Const., as follows: "*Special law* means a special or local law." (Emphasis supplied.)

At first blush there appears to be an inconsistency in the language of the two provisions of Art. VIII, State Const. quoted above, relative to the possible effect of an ordinance on a local law. In Re Advisory Opinion to the governor, Fla. 223 So.2d 35 at 40, the Court indicated that it was not inappropriate to look to the minutes of the Constitutional Revision Commission for guidance in determining the intent of the framers of the new constitution. In this instance, the revision commission minutes shed little light on the intent of Art. VIII, § 6(d) State Const., except to reveal that all through the original consideration this section was included in the schedule as Art. XII, § 12, until the final days of drafting when it was transferred without change to Art. VIII.

It is a fundamental rule of construction that statutory and constitutional provisions relating to the same subject should be read *in pari materia*, see *State ex rel. McClure v. Sullivan*, Fla., 43 So.2d 438, and thus every effort should be made to read Art. VIII, § 1(f) and 6(d), State Const., together.

It is known that it was the intent of the framers of the new constitution to give local government broad home rule powers, and this appears to be substantiated in the language of § 4, Ch. 69-234, Laws of Florida (§ 125.65(3), F. S.).

It is noted that Art. VIII, § 6(d), State Const., is a temporary provision, the deletion of which can be accomplished by the legislature under the provisions of Art. VIII, § 6(g). This seems to lend weight to the theory that it was the intent of the framers of the new constitution that counties have the initial authority, under their broad home rule provisions, to repeal preexisting local laws "relating only to unincorporated areas of a county" without the necessity of having to ask the legislature to repeal those local laws no longer necessary under the new home rule form of government. Article VIII, § 6(d) has no application to future local laws, and presumably it will be repealed at such time as the counties have had sufficient time to clear the books of archaic and unnecessary local legislation.

It should be noted that the Florida Supreme Court has generally defined a special law as one relating to particular persons or things or other particular subjects of a class and a local law as one relating to particular subdivisions or portions of the state. See *State ex rel. Buford, Atty. Gen. v. Daniel et al.*, 99 So. 804. Article X, § 12(g), of the 1968 State Const., however, apparently makes these terms interchangeable although no strict legal definition is offered therein. Based upon this provision, the powers of repeal offered in Art. VIII, § 6(d) State Const., therefore would apply to the special acts enumerated in your letter.

Reading Art. VIII, § 1(f) and § 6(d) State Const., together, it appears that a county operating under a noncharter form of government may by properly enacted ordinance amend or repeal special or local laws applicable only to the unincorporated area of the county. No noncharter county may enact an ordinance inconsistent with any general law or any special law enacted subsequent to Jan. 7, 1969, or with any special or local law as so amended by Art. VIII, § 6(d). Nor may a noncharter county specifically repeal by ordinance any local or special act adopted subsequent to Jan. 7, 1969. It should be further explained that those special or local laws which are not repealed by ordinance remain in effect and a county should not under existing rules of construction try to repeal a special law by implication through the enactment of an inconsistent ordinance since the special law would prevail over the ordinance in the event of an irreconcilable conflict.

Accordingly, it would appear that the county might by ordinance repeal those special laws listed in your inquiry, all of which became law prior to the adoption of the 1968 State Constitution, unless any of said laws have application to the municipalities in the county or otherwise relate to more than the unincorporated area of the county. The procedure for enacting such a repealing ordinance is to be found in Ch. 69-32, Laws of Florida (§ § 125.66-125.68, F. S.).

Conditioned upon these observations, your question is answered in the affirmative.

069-100—November 3, 1969

**GOVERNMENTAL REORGANIZATION  
POWERS, DUTIES AND FUNCTIONS OF COMPTROLLER  
TRANSFERRED TO THE DEPARTMENT OF REVENUE  
BY § 21(4), CH. 69-106, LAWS OF FLORIDA  
(§ 20.21(4), F. S.)**

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

**QUESTIONS:**

1. Does § 21(4) of Ch. 69-106, Laws of Florida (§ 20.21(4), F. S.), transfer to the department of revenue all of the powers, duties and functions of the comptroller of the state of Florida, as prescribed by Ch. 193, F. S., 1967?

If question 1 is answered in the negative:

2. What powers, duties, and functions of the comptroller as prescribed in Ch. 193, F. S., 1967, were transferred by Ch. 69-106, Laws of Florida, to the department of revenue?

If question 1 is answered in the affirmative:

3. What are the powers, duties, and functions of the department of revenue relative to the enforcement of § 193.321, F. S., 1967?

4. For what period should the budgets of county tax assessors and county tax collectors be prepared and should they be approved by the department of revenue prior to the beginning of such period?

The controlling general law, § 21(4), Ch. 69-106, Laws of Florida (§ 20.21(4), F. S.) provides:

(4) *The powers, duties, and functions of the comptroller of the state, as prescribed by chapter 192 (supervision of county tax assessors, uniformity of assessments), chapter 193 (approval of county tax assessors' budgets), chapter 195 (railroad and telegraph taxes, pullman and express gross receipts tax), chapter 196 (court proceedings relating to taxation), chapter 199 (supervision of intangible personal property tax), chapter 200 (supervision of tangible personal property tax) and those duties relating to supervision of municipal tax assessment and collection, including § 195.061, are transferred by a type four transfer to the department of revenue. (Emphasis supplied.)*

**AS TO QUESTION 1:**

Your first question is answered in the affirmative: To the full extent that a transfer is constitutionally permissible, § 21(4), Ch. 69-106, Laws of Florida (§ 20.21(4), F. S.), accomplishes this by its provision for transfer of the *powers, duties, and functions of the comptroller as prescribed by Ch. 193, F. S.* The parenthetical reference, following this language, to "approval of county tax assessors' budgets" does not amount to an express limitation of the preceding general language, and does not confine the transfer to one affecting only the duties specifically described. Because, in ordinary usage, parenthetical statements denote example and illustration, the specific reference to "approval of county tax assessors' budgets" was not in my opinion intended to constitute an enumeration of all subject matter affected—a result which

could easily have been accomplished by limiting the transfer to duties prescribed by a specific section of the chapter or to those duties prescribed by Ch. 193 relating to the specific subject. To add or imply such restrictive terms is not permissible under accepted rules of construction for statutory language, nor is such a result supported by consideration of the context of this enactment, which transfers other broad powers under related chapters of the statutes in the area affected. In sum, the language of the statute furnishes no criterion by which to restrict its general words. Sutherland, *Statutory Construction*, 3rd Ed., Vol. 2, p. 405, et seq.

### AS TO QUESTION 3:

The statutory definition of the powers, duties, and functions of the department relative to the enforcement of § 193.321[§ 200.071], F. S. (aggregate millage limitations) includes the duty under § 193.326[§ 195.051], F. S. to "determine each year whether the several counties of this state are assessing the real and tangible personal property within their jurisdiction in accordance with law." The further duty to "withhold from such county a portion of any state funds" in the prescribed amount would appear to be a constitutional function of the comptroller not affected by § 21(4) of Ch. 69-106, Laws of Florida[§ 20.21(4), F. S.]. The final provision of subsection (4) for transfer of comparable functions for municipalities refers to "those duties relating to supervision of municipal *tax assessment and collection, including § 167.445[§ 195.061], F. S.*" (Emphasis supplied.) This states, in my opinion, a transfer limited to supervision of assessment and collection, and supports the conclusion above that the Comptroller's duty as to disbursement is unaffected.

Additional authority, also transferred from the comptroller to the department by § 21(4), Ch. 69-106, Laws of Florida[§ 20.21(4)], F. S., is set out in § 196.16[§ 195.041], F. S., as follows:

**195.041 Authority to bring and maintain suits.**—The department of revenue shall have authority to bring and maintain such actions at law or in equity by mandamus or injunction, or otherwise, to enforce the performance of *any duties* of any officer or official performing duties *with relation to the execution of the tax laws* of the state, or to enforce obedience to any lawful order, rule, regulation or decision of the department of revenue lawfully made under the authority of these tax laws. (Emphasis supplied.)

This provision by its reference to "any duties of any officer with relation to the execution of the tax laws of the state" grants authority to the department to enforce by legal action the requirements of § 193.321[§ 200.071], F. S., imposed on county budget officers or boards of county commissioners.

Another mandate is that of § 193.02(4)[§ 195.011(4)], F. S., to "... investigate the conduct and performance of duties by tax assessors, tax collectors, clerks of the circuit court, sheriffs and members of the board of county commissioners when acting as a board of equalization and recommend to the governor the removal of any such official for his willful failure to properly perform the duties imposed upon him by the constitution, these tax laws and the rules and regulations prescribed pursuant to these tax laws, and furnish the evidence to the governor upon which such removal may be warranted." The enumeration of officers affected by § 193.02(4)[§ 195.011(4)], F. S., does not include budget officers or county commissioners except when acting as a board



of equalization or adjustment, and the statute therefore apparently does not in terms relate to the enforcement of § 193.321[§ 200.071], F. S.

#### AS TO QUESTION 4:

Section 193.02(1)[§ 195.011(1)], F. S., requires the submission of budgets "On or before July first . . . for the *ensuing* year." (Emphasis supplied.) In view of the accepted principle that such procedural provisions should be liberally and not strictly applied, I find the quoted language insufficient to preclude the past administrative practice of submitting, on July 1 of each year, budgets for the current calendar budget year. Since the provision does not state explicitly that budgets must be approved prior to the beginning of the budget period, its terms appear to be met if budgets are submitted on the specified date for a period covering in substantial part, the year following that date.

069-101—November 4, 1969

#### COUNCIL FOR THE BLIND

##### DONATION FOR BENEFIT OF BLIND—ADMINISTRATIVE PROCEEDINGS FOR EARMARKING GIFT

To: James A. Bax, Secretary, Department of Health and Rehabilitative Services, Tallahassee

#### QUESTION:

May the bureau of blind services continue to receive and use for its own purposes bequests, gifts, and donations designated by donors or decedents for use by the Florida council for the blind?

The Florida council for the blind, established by former § 409.26, F. S., was transferred to § 413.011, F. S., under provisions of § 1, Ch. 61-210, Laws of Florida.

Section 413.011(10), F. S. authorized the council to:

Receive moneys or properties by gift or bequest from any person, firm, corporation or organization . . . All such moneys or properties so received by gift or bequest as herein authorized, may be disbursed and expended by the bureau upon its own warrant . . . and such moneys or properties shall not constitute or be considered a part of any legislative appropriation . . .

By reorganization of Florida's executive branch, the Florida council for the blind was transferred by a type 5 transfer to the department of health and rehabilitative services and its functions assigned to the bureau of blind services of the division of vocational rehabilitation. See § 19(12), Ch. 69-106, Laws of Florida (§ 20.19(12), F. S.).

A type 5 transfer provides for the continued existence of the governing board, however designated, of any agency, but renames said board as "council," its powers to be *strictly advisory* to the division or bureau to which it is attached. Section 6(5), Ch. 69-106, Laws of Florida (§ 20.06(5) F. S.). Further, "council" is defined by § 3(7), Ch. 69-106, Laws of Florida (§ 20.03(7), F. S.), as:

. . . [A]n advisory body appointed to function on a continuing basis for the study, and recommendation of solutions and policy alternatives, of the problems arising in a specified functional or program area of state government . . .

The powers of the former council for the blind have been repealed by implication, therefore, including authority to receive moneys, be-

quests and gifts, which is now in the secretary as head of the department [§ 19(1), Ch. 69-106, Laws of Florida(§ 20.19(1), F. S.)], said authority derived from § 5(6), Ch. 69-106, Laws of Florida(§ 20.05 (6), F. S.), which states:

Each head of a department, except as otherwise provided herein shall:

(6) Have authority on behalf of the department to accept gifts, grants, bequests, loans, and endowments for purposes consistent with the powers, duties, and functions of the department;

Therefore, your question must be answered in the negative as such authority now exists in the head of the department under Ch. 69-106, Laws of Florida (Ch. 20, F. S.).

I might add that in order to accommodate a donor who wishes to donate specifically for the benefit of the blind, his gifts should be "earmarked." This can be done by the head of the department simply agreeing with the donor that the gift shall go for the purposes for which it was donated. Otherwise, I fear that many donors would hesitate and fail to donate anything to a department head without any reliance that it be used for the benefit of those less fortunate than others.

I am confident the head of the department would agree to set up an internal procedure whereby prospective donors may donate to the department with the assurance that it will accrue to the ultimate benefit in conformance with the donor's wishes. If otherwise, any citizen making a donation thinking it shall be for the blind shall be extremely disenchanted to find out later that it went for some other cause, albeit charitable. Certainly, this cannot be left to conjecture and speculation on the part of the head of the department. It should be clearly understood by the donor and the donee.

069-102—November 5, 1969

#### ALCOHOLIC BEVERAGES

#### CONSTRUCTION OF CH. 69-1131, LAWS OF FLORIDA, AS TO ON-CAMPUS SALES AT UNIVERSITY OF SOUTH FLORIDA

To: *Robert B. Mautz, Chancellor, Board of Regents, Division of Universities, Tallahassee*

#### QUESTION:

Does Ch. 69-1131, Laws of Florida, rule out the establishment of a rathskeller on the campus of the University of South Florida?

A study of § 1, Ch. 69-1131, Laws of Florida, indicates that it amends prior Ch. 67-1480, Laws of Florida, to add the following proviso to the prohibition in Ch. 67-1480 against any vendor under the beverage laws owning a license within 2,500 feet of the university campus:

Section 1. No vendor's license shall be issued or transferred under the beverage laws of this state to any vendor whose place of business is located within a distance of less than twenty-five hundred (2,500) feet from the boundaries of the campus of the University of South Florida \*except to vendors of beer and

\*Note.—Remainder of section added by Ch. 39-1131, Laws of Florida.

wine for off premises consumption, provided, however, this exception shall not be construed to authorize the location of any place for the sale of alcoholic beverages within the boundaries of the campus of the University of South Florida.

Considering the above language, it appears that the intent of the legislature in amending Ch. 67-1480, Laws of Florida, was to make clear that this prior special act was to apply to all vendors on the campus as well as those within 2500 feet of its boundaries, except vendors of beer and wine for off-premises consumption. In view of this added language, it is my conclusion that the act prohibits the establishment of such a rathskeller in which alcoholic beverages, even limited to beer and wine, are sold for consumption on the premises.

069-103—November 6, 1969

#### INTER-AMERICAN CENTER AUTHORITY

#### CONSTRUCTION OF § 1(5), CH. 69-138, LAWS OF FLORIDA, AS TO THE AUTHORITY OF DADE COUNTY TO USE COUNTY FUNDS TO RETIRE DEBTS OF INTERAMA

To: *Thomas C. Britton, County Attorney, Miami*

#### QUESTIONS:

1. In light of § 1(5), Ch. 69-138, Laws of Florida, may the board lawfully appropriate any Dade County funds to pay the obligations of or encumbrances upon the assets of the former Inter-American center authority without approval by referendum election?

2. If question 1 is answered in the affirmative, would you please identify which county funds may be so appropriated and under what authority?

By Ch. 69-138, Laws of Florida, the legislature has transferred to the board of county commissioners of Dade County all the powers, duties, liabilities and assets of the Inter-American center authority provided for by and acquired by the authority pursuant to Ch. 554, F. S. Section 1(5) of Ch. 69-138, Laws of Florida, authorizes the board to levy a tax of not to exceed one mill to be earmarked for Inter-American center purposes. It specifically provides, however, that this special tax levy must be approved by a majority of those freeholders voting in a referendum election in Dade County.

The real question here is whether the legislative authorization of an ad valorem tax to be levied upon approval of the freeholders should be interpreted as prohibiting the allocation of any county funds to the Inter-American center by the board except those collected from a tax levied pursuant to approval in a referendum election.

Under the express terms of Ch. 69-138, Laws of Florida, providing for the financing, construction and operation of the Inter-American center, the board may exercise the powers and privileges held by it under the port authority act, Ch. 22963, Laws of Florida, 1945; by the home rule charter of Dade County and the code of Metropolitan Dade County; and by the Inter-American center authority act, Ch. 554, F. S., when not inconsistent with those conferred by the port authority act and the home rule charter. The financing and operation of the Inter-American center is unquestionably for a public purpose, see *State v. Inter-American Center Authority*, Fla. 1955, 84 So.2d 9, and *State v. Inter-American Center Authority*, Fla. 1962, 143 So.2d 1. As a State agency, it was held to be entitled to participate in the deficiency

appropriation made by the 1951 appropriations Act on the same basis as any other state agency. See AGO 051-321, Sept. 17, 1951, Biennial Report of the Attorney General, 1951-1952, p. 440. By Ch. 69-138, Laws of Florida, it has now been turned over to Dade County with, apparently, the same status as that of the Dade County port authority, *except* that a special tax earmarked for the Inter-American center cannot be levied without the prior approval of the freeholders—whereas, the port authority act expressly provides for an annual levy of not to exceed one mill for port authority purposes, without freeholder approval.

In *Burton v. Dade County, Fla.* 1964, 166 So.2d 445, in affirming a decree validating certain revenue bonds proposed to be issued by Dade County to construct an airport to be operated by the Dade County port authority, the court said: "...since the operation of an airport is a proper county function we conclude that the expenditure of public funds for this purpose is legitimate."

See also AGO 060-101, May 31, 1960, Biennial Report of the Attorney General, 1959-1960, p. 602, holding that race track funds that are not allocated by the legislature or the county budget to another purpose may be pledged as security for port authority revenue certificates proposed to be issued under the authority of the general port authority act, Ch. 315, F. S.

Therefore, it affirmatively appears that a port authority project may be financed by funds other than, or in addition to, those specifically provided for it by the enabling act; and it would seem, by analogy, that a similar appropriation could be made for the Inter-American center. You are advised, therefore, that § 1(5) of Ch. 69-138, Laws of Florida, does not limit the appropriation of county funds to the Inter-American center to those collected from a tax levied pursuant to the approving vote of the freeholders.

As to the county funds that may lawfully be appropriated for the payment of the outstanding revenue bonds of the Inter-American center authority, it appears that the center is a public project in the sense that it is established for "educational" and "scientific" purposes, see *State v. Inter-American Center Authority*, *supra*, 84 So.2d 9, but not in the sense of an essential governmental service or project, such as a courthouse or jail.

You are advised, therefore, that the Inter-American center is in the same position as is any other public (but not essential governmental) project of the county, insofar as the appropriation of county funds to its use and benefit are concerned. For example, the appropriation of tax funds for servicing the outstanding revenue bonds is, of course, limited by the provisions of Art. VII, § 12, State Const. 1968 (formerly Art. IX, § 6, State Const.), see *State v. Citrus County, Fla.* 1934, 157 So. 4, and similar cases; and it also appears to be settled that funds expressly allocated by the legislature or by the county budget to a specific purpose may not be diverted to another purpose. See *Bigham v. State, Fla.* 1934, 156 So. 246; *Owen v. Ausley*, 143 So. 588. (It is noted, parenthetically, that the one-mill tax levy authorized by the Dade County port authority act is specifically allocated to the purposes authorized by that act.)

With these limitations, and perhaps others, and within the authority granted to the board of county commissioners by the home rule charter, the code of Metropolitan Dade County, the port authority act, and the Inter-American center authority act, the board of county commissioners may appropriate for the Inter-American center such county funds as it is authorized by law to appropriate for other similar public projects of the county.



069-104—November 6, 1969

## STATE LANDS

LIABILITY OF STATE FOR SPECIAL ASSESSMENTS BY  
SPECIAL WATER DISTRICT FOR WATERWORKS IM-  
PROVEMENTS—CONSTRUCTION OF CH. 24429,  
LAWS OF FLORIDA, 1947

To: James W. Apthorp, Executive Director, Board of Trustees of the  
Internal Improvement Trust Fund, Tallahassee

## QUESTION:

Is land of the State of Florida, the title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund by Chs. 67-269 and 67-2236, Laws of Florida (§ § 253.02, 253.03, F. S.), subject to assessment under Ch. 24429, Laws of Florida, 1947, and Ch. 25726, Laws of Florida, 1949?

Chapter 24429, Laws of Florida, 1947, provides for the establishment of a special water district known as the Homosassa Special Water District. Section 13(m), Ch. 25726, Laws of Florida, 1949, provides, *inter alia*, for the levying of special assessments upon certain publicly-owned property within the district, in the following language:

The county or counties in which the district is located and each school district and other political subdivision wholly or partly within the district shall possess the same power and be subject to the same duties and liabilities in respect of assessment under this section affecting the real estate of such county, district or other subdivision which private owners of real estate possessor are subject to hereunder, and such real estate of any county, school district and political subdivision shall be subject to liens for said assessments in all cases where the same property would be subject had it at the time the lien attached been owned by a private owner.

Although the body of § 13(m), Ch. 25726, Laws of Florida, 1949, provides that "such real estate of any such county, school district and political subdivision" shall be subject to liens for said assessments in all cases where the same property would be subject had it at the time the lien attached been owned by a private owner, the act does not in terms authorize the assessment of lands for special benefit held or owned by the state or any of its agencies.

Neither the state nor any of its agencies is specifically assessed. Pursuant to Chs. 67-269 and 67-2236, Laws of Florida (§ § 253.02, 253.03, F. S.), the land in question is vested in the board of trustees of the internal improvement trust fund.

The words "other political subdivisions" do not provide legislative authority for imposing an assessment upon such lands because under the provisions of § 1.01(9), F. S., the words "public body," "body politic" or "political subdivision" includes counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts and all other districts in this state, none of which are inclusive of lands owned or held by the state or any of its agencies for the purposes of the aforementioned chapters.

It is a general rule of law that the property of a state is not subject to taxation in the absence of a statute providing therefor. The state is not considered within the purview of statutes and laws, however general and comprehensive, unless an intention to include the state is clearly manifest from such statutes or laws. See AGO 065-140, Dec. 15, 1965,

Biennial Report of the Attorney General, 1965-1966, p. 212; 82 C.J.S. 554, *et seq*; 62 C.J.S. 319, *et seq*; AGO 058-119, Apr. 7, 1958, Biennial Report of the Attorney General, 1957-1958, p. 631; 84 C.J.S. 386, § 200; 65 So. 653 and 68 So. 759; 50 So. 421; 156 So. 97; 119 So.2d 323; 57 So.2d 337, 341 (5,6), (9); 107 So.2d 27, 86 So.2d 887; also see § 192.08[§ 196.30] and § 235.34, F. S. See 86 So.2d 887 and § 235.34, F. S., as relates to "other state agencies"; also see § 298.36, F. S., as to language assessing the benefits to state land and directing payment thereof out of specific fund.

The titles of the aforementioned special acts do not provide a solution to the problem because there is no mention within the titles that the legislative intent was to include the state board of trustees of the internal improvement trust fund. *Curry v. Lehman*, 47 So. 18, 55 Fla. 847; *County of Hillsborough v. Price*, 149 So.2d 912.

While the state may, by positive legislative enactment, declare that its property may be assessed for local improvements, the legislature has not chosen to do so in this instance, and your question therefore must be answered in the negative.

069-105—November 6, 1969

#### BUILDING CODES

#### SAFETY RESTRICTIONS—GLASS, SAFETY GLAZING MATERIALS—CONSTRUCTION OF TERMS "REPAIR" AND "ALTERATIONS"

To: *Richard E. Gerstein, State Attorney, Miami*

#### QUESTION:

Do the provisions of \*§ 877.12, F. S., establishing new standards for glass panels apply to routine replacements?

Section 877.12(2), F. S., provides:

This section shall apply statewide in both incorporated and unincorporated areas to all new buildings and structures, both public and private, and to *all alterations in any new or existing building or structure.* (Emphasis supplied.)

It appears from the above that the resolution of your question would turn on the interpretation of the word alteration. In *Berry v. City of Atlanta*, 75 Ga. App. 278, 43 S.E.2d 191, the court held that under a building ordinance reroofing a house constituted a repair and not an alteration. In *City of Le Mars v. Fisch*, 251 Iowa 149, 100 N.W.2d 14, the court held that the lowering of heat ducts did not constitute an alteration. In *Ten-Six Olive, Inc. v. Curby, C.A. Mo.*, 208 F.2d 117, the court held that an alteration denoted a substantial change while repair means to restore the soundness of the structure or to keep the property in good order.

It appears from the above-cited authorities that the replacement of a glass panel would not constitute an alteration and thus the replacement of a glass panel could be made without the necessity of complying with the provisions of §§ 1-4, Ch. 69-134, Laws of Florida (§ 877.12, F. S.).

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\*Note.—Ch. 70-377, Laws of Florida, repealed § 877.12 and reenacted its substance with some amendments. The provisions of Ch. 70-377 were assigned to § 553.24-553.28, F. S.

069-106—November 6, 1969

# DIVISION OF MOTOR POOL

## APPLICATION OF § 287.20, F. S. TO MOTOR VEHICLES OWNED BY DEPARTMENT OF PUBLIC SAFETY PRIOR TO EFFECTIVE DATE OF THE GOVERNMENTAL REORGANIZATION ACT

To: *H. N. Kirkman, Executive Director, Department of Highway Safety and Motor Vehicles, Tallahassee*

### QUESTION:

Does § 22(6)(g) of Ch. 69-106, Laws of Florida, the governmental reorganization act (§ 287.20, F. S.), apply to all motor vehicles formerly owned by the department of public safety and transferred to the department of highway safety and motor vehicles?

Under § 24(3) and (4) of Ch. 69-106, Laws of Florida (§ 20.24(3),(4), F. S.), the former department of motor vehicles and the former department of public safety, along with all of their property and appropriated funds, were transferred to the new department of highway safety and motor vehicles.

Section 22(6)(g) of Ch. 69-106, Laws of Florida (§ 287.20, F. S.), provides as follows:

The provisions of part II of chapter 287 do not apply to motor vehicles used exclusively by the department of highway safety and motor vehicles for law enforcement purposes. Title to such vehicles shall be in the state.

After reviewing the above-cited section, it appears clear that *only* those motor vehicles used *exclusively* for law enforcement purposes by your department would not come within the scope of § 22(6), Ch. 69-106, Laws of Florida (§ 287.20, F. S.), titled division of motor pool. Any vehicles other than those mentioned above would be subject to the various provisions of § 22(6) of the reorganization act (§ 287.20, F. S.).

069-107—November 13, 1969

# REGULATION OF HIGHWAY SAFETY

## MOTOR VEHICLES DESIGNATED "EMERGENCY VEHICLES"—LIMITATIONS ON THE USE OF FLASHING COLORED LIGHTS

To: *H. N. Kirkman, Executive Director, Department of Highway Safety and Motor Vehicles, Tallahassee*

### QUESTIONS:

1. What kind of vehicles may the department of highway safety and motor vehicles designate as "authorized emergency vehicles"?
2. Which vehicles may use flashing colored lights without being designated as emergency vehicles by the department of highway safety and motor vehicles?

### AS TO QUESTION 1:

Under the provisions of § 317.011(1), F. S., the department of public safety is authorized to designate as emergency vehicles "such ambulances and emergency vehicles of municipal departments or public service

corporations and ambulances operated by private corporations" as are in the department's judgment necessary to provide the emergency service that the public interest, in any given exigency, may require. Your first question is, therefore, answered accordingly.

#### AS TO QUESTION 2:

Section 317.902, F. S., as amended by Ch. 69-154, Laws of Florida, assigns blue, red, and amber lights to specifically designed vehicles as follows: (1) BLUE: Only police vehicles may show and display blue lights. (2) RED: Vehicles of the fire department, fire patrol, including vehicles of volunteer firemen as permitted under § 317.991, F. S., and ambulances that have been designated emergency vehicles under § 317.011(1), F. S., may show or display red lights. (3) AMBER: Wreckers, mosquito control fog and spray vehicles, emergency vehicles of governmental departments or public service corporations may, when in actual operation or a hazard exists, show or display amber lights provided they are not used in going to or from the scene of operation or hazard without specific authorization of a law enforcement officer or agency. Escort vehicles are also permitted to show or display amber lights when actually in the process of escorting authorized movement of over-dimensioned equipment, material or buildings. Road or street maintenance equipment vehicles, including road service vehicles and mail carrier vehicles, may also show or display amber lights when in operation or a hazard exists. School buses are authorized to show and display those lights as provided for in Ch. 234, F. S.

All vehicles enumerated in the amber group (3) except road or street maintenance and service equipment and vehicles and mail carriers were permitted and authorized prior to the enactment of Ch. 69-154, Laws of Florida, to show or display red lights. It is clear that the general driving public does not consider those vehicles presently enumerated in the amber group as real emergency vehicles. By reducing the number of blue and red light carriers to those vehicles that are truly emergency vehicles, the legislature no doubt placed more emphasis on these vehicles with the hope that there would be more public attention, obedience and safety in all occasions in which they are used.

Section 317.902(6), F. S., provides that "Flashing lights are hereby prohibited on vehicles except as a means of indicating a right or left turn or change of lanes or to indicate that a vehicle is lawfully stopped or disabled upon the highway." This subsection was also amended by Ch. 69-217, Laws of Florida, by adding to the then existing exemptions against the prohibited use of flashing lights the phrase "or to change lanes." Therefore, the legislature, through this amendment, clearly indicated that it was aware of the prohibitions on the use of flashing lights and that it was its intention not to grant carte blanche permission to use colored flashing lights. This is further emphasized when we note in the following subsection (7) that the legislature clearly provided that the provisions contained in subsection (6) prohibiting flashing lights "shall not apply to police, fire, authorized emergency vehicles, or rural mail carriers while in performance of their necessary duties."

Therefore, in the absence of your department designating any authorized emergency vehicles under the provisions of § 317.011(1), F. S., only police, fire, or rural mail carriers while in performance of their necessary duties and privately-owned vehicles of volunteer firemen under § 317.991, F. S., may use flashing lights. Your second question is, therefore, answered accordingly.

My opinion on your questions is based upon the statutes as presently written, and I do not question the authority or wisdom of the



legislature in its restriction and limitation upon the use of flashing colored lights. However, I am not unmindful of the opinion of those who would contend that a vehicle worthy enough to be authorized to show or display amber lights should also be permitted to flash them, to make them more attractive to the eye, in order to gain the maximum benefits of adequately advising, cautioning and warning the general public.

069-108—November 13, 1969

**ASSISTANT PUBLIC DEFENDERS  
PRACTICE OF CRIMINAL LAW—PROHIBITION AGAINST  
PARTNERSHIP ASSOCIATION WITH FIRM  
PRACTICING CRIMINAL LAW**

*To: Irvin Frank, Jr., Public Defender, Fort Pierce*

**QUESTION:**

Is it proper for an assistant public defender to be a partner in a law firm with another partner who engages in the private practice of criminal law?

Upon the basis of the authorities cited hereinafter, your question is answered in the negative.

Section 27.51(3), F. S., provides that:

(3) The public defender and assistant public defenders shall give priority and preference to their duties under the provisions of this act and may engage in private practice of law only to the extent that it will not interfere with or prevent performance of their duties as public defender and assistant public defenders and shall not otherwise engage in the practice of criminal law.

This statutory provision forbids the practice of criminal law by an assistant public defender otherwise than in his capacity as assistant public defender.

In its Opinion 66-1, dated Jan. 5, 1966, the Professional Ethics Committee of The Florida Bar (Selected Opinions of the Professional Ethics Committee of The Florida Bar, 1959-1967, pp. 343, 344) said:

... The relations of partners in a law firm are so close that the firm and all the members thereof, are barred from accepting any employment that any one member of the firm is prohibited from taking. ABA Opinion 72 (1932); ABA Opinion 50 (1931); ABA Opinion 49 (1931); ABA Opinion 33 (1931).

Furthermore, the law partner of an assistant public defender, while engaged in the private practice of criminal law, acts as the agent of such assistant public defender, as appears from the following pronouncements made by the Sup. Ct. of Fla. in *Proctor v. Hearne*, 131 So. 173, 177:

Each one of several joint adventurers has power to bind the others in matters which are strictly within the scope of the joint enterprise.

This is also the rule that is applied to each member of a partnership (47 C.J. 845; 20 R.C.L. 884); it being in effect a contract of mutual agency, each partner acting as a principal in his own behalf and as agent for his copartners. 47 C.J. 826; 20 R.C.L. 882, 883.

The following quotation is from 2 C.J.S. 1182, Agency, § 91a:

The acts or statements of an authorized agent with reference to the business in which he is at the time employed, and within the limits of his authority, are the acts or statements of his principal, principal and agent being the same person in legal contemplation when the latter is acting within the scope of his authority. . . .

Of course, an assistant public defender may not privately practice criminal law through the agency of his partner, since, as is said in 2 C.J.S. 1039, 1040, Agency, § 12:

An act which, if done by the principal, would be illegal as in violation of common law or of some statutory provision cannot be done for him by an agent, and any agreement that authorizes or requires, or tends to induce, an agent to do such an act is void. . . .

Consequently, as indicated above, your question is answered in the negative.

069-109—November 14, 1969

#### TAXATION

#### INSTALLMENT PAYMENTS OF COMMISSIONS FOR COLLECTION AND ASSESSMENT OF TAXES—GENERAL SCHOOL DISTRICT TAXES

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

#### QUESTION:

Are the 10 mills of ad valorem taxes levied "for all school purposes" pursuant to the provisions of Art. VII, § 9(b), State Const., considered to be "special tax district taxes" as contemplated by Section 193.65(4)[§ 192.091(4)], F. S., so that the payment of tax assessors' and tax collectors' commissions thereon would be required to be made on a monthly basis?

The taxes involved are school district taxes which will be levied under the provision in Art. IX, § 4(b), State Const., that "The school board shall . . . determine the rate of school district taxes within the limits prescribed herein. . . ." in conjunction with Art. VII, § 9(b), State Const. which states millage limitations for school purposes independently of those for counties and special districts. Attorney General Opinion 069-51 of this publication.

The statutory language now in question is that part of § 193.65(4)[§ 192.091(4)], F. S., making "special tax district taxes" subject to the provisions of §§ 193.67 and 193.671[§§ 192.101 and 192.114], F. S., which require advance monthly payments of commissions on county taxes. Section 193.65(4)[§ 192.091(4)], F. S., states:

. . . All commissions for assessing and for collecting *special tax district taxes* shall be paid at the time and in the manner now or as may hereafter be provided for the payment of the commissions for the assessment and for the collection of county taxes. . . . (Emphasis supplied.)

Under existing law it seems clear that commissions for assessment and collection of general school district taxes, within the 10-mill limitation of Art. VII, § 9(b), State Const., must ultimately be paid by the district school board. Attorney General Opinion 069-47 of this publication.

I conclude, however, that school district taxes within the constitutional 10-mill limit are *general* school district taxes, and that the above statutory reference to "special tax district taxes" does not include this constitutionally prescribed school district millage. Commissions for assessment and collection of the general school district millage are therefore not governed by the specific statutory provisions for advance monthly payment of commissions on county and special district taxes. This conclusion is, in my opinion, confirmed by the fact that there remains a distinction, under the constitution and statutes, between general school district taxes and other levies for school purposes, subject to referendum, which may properly be designated *special* school district taxes. Attorney General Opinions 069-41 and 069-95 of this publication.

Your question is answered in the negative.

069-110—November 17, 1969

### TAXATION

#### SUBSURFACE RIGHTS—ASSESSMENT—RETURNS

To: *Lucille Small, Tax Assessor, LaBelle*

#### QUESTIONS:

1. What is the effect upon the assessment on the fee where the state owns an interest in the subsurface rights?
2. May the owner of the fee make a return of the interest owned by the state?

Under § 193.221(1)[§ 193.481(1)], F. S., mineral, oil, gas and other subsurface rights are to be treated as an interest in real property and subject to separate taxation. Since state property is immune from taxation, § 192.06(1)[§ 196.191(1)], F. S., and *Park-N-Shop, Inc. v. Sparkman*, 99 So.2d 571 (Fla. 1957), the separate valuation of such subsurface rights owned by the state may result in a reduced assessment of the fee. No taxes will be paid on the value of the state's interest. The surface rights and any remaining subsurface rights should then be assessed at just value, but in no event should this assessed value plus that of the state's subsurface rights exceed the just value of the property as a whole.

The owner of the fee subject to the subsurface rights cannot make a return of the interest held by the owner of the rights. Prior to the effective date of Ch. 69-60, Laws of Florida[§ 193.481, F. S.], the owner could make such a return. This was established in the recent case of *Dickinson v. Davis*, 224 So.2d 262 (Fla., 1969). Subsequent to this decision, Ch. 69-60, Laws of Florida, became effective. In an apparent attempt to destroy the efficacy of the *Dickinson v. Davis* holding, the legislature removed from § 193.221(1)[§ 193.481(1)], F. S., the language which was the basis for that holding. The pertinent portion of subsection (1) now reads:

... Such mineral, oil, gas, and other subsurface rights, when separated from the fee or other interest in the fee, shall be subject to separate taxation. ...

The legislature removed from the end of the sentence quoted above the clause:

... [W]hen returned for taxation by the owner of the fee, or other interest in the fee, or the owner or claimant of such subsurface rights or interests, or any person, firm or corporation claiming by, through or under the subsurface owner or claimant. ...

This is the clause which the Sup. Ct. held in *Dickinson v. Davis* authorizing the owner of the fee to return the subsurface rights. With its removal from the statute, this authorization ceases.

069-111—November 17, 1969

### TAXATION

#### TAX DEEDS—NOTICE TO OWNERS—DISPOSITION OF SURPLUS

To: *Richard L. Fletcher, Jr., Board of County Commissioners, Orlando*

#### QUESTIONS:

1. Is it acceptable procedure under § 194.18(1)[§ 197.505(1)], F. S., for the clerk of the circuit court to ascertain the owner of the property, to whom notice of application for a tax deed must be sent, by determining who is the current owner of record?

2. When a balance remains from a tax deed sale after payment of liens, may the clerk send notice of this as required by § 194.22(2)[§ 197.535(2)], F. S., to the record owner as of the date of the sale?

The first question appears to be controlled by the case of *Montgomery v. Gipson*, 69 So.2d 305 (Fla., 1954). The Sup. Ct. said:

It is our opinion, then, that the jurisdictional requirement of notice, as specified in § 194.18[§ 197.505], F. S., is not satisfied except by the due performance of every step in the proceedings outlined therein . . . .

The procedure outlined in the statute must accordingly be followed, and other methods may not be substituted to determine the owner to whom notice shall be sent. *Bailey v. Folks*, 182 So.2d 477 (Fla. App. 1st, 1966).

Payment of surplus presents a different issue. The person entitled to receive such payment would appear to be the legal owner as of the date of the tax sale. Notice to such person is covered under § 194.22(2)[§ 197.535(2)], F. S., and is required only if the name and address of such person is *known* to the clerk. The only knowledge required of the clerk under these tax deed statutes are the names and addresses on the tax roll and tax receipt list. It would therefore be wise, in the light of *Bailey v. Folks*, to send notice to any such person. The funds are to be paid to the legal owner as of the date of the sale, if claim is made by him. Attorney General Opinion 047-22, Jan. 18, 1947, Biennial Report of the Attorney General, 1947-1948, p. 208, adequately covers a situation involving a subsequent transferee's claim to the surplus.

069-112—November 21, 1969

### JUVENILES

#### CRIMINAL LAW—USE OF PHOTOGRAPHS BY LAW ENFORCEMENT OFFICERS FOR IDENTIFICATION AS EVIDENCE—LINEUPS PROHIBITED

To: *Rom W. Powell, County Solicitor, Orlando*

#### QUESTIONS:

1. Does § 39.03(6), F. S., permit the law enforcement



agency originating a juvenile's photograph thereunder, or the sheriff's department receiving a duplicate photograph, to use said photograph together with a selection of previously taken photographs of other juveniles in making a photographic identification of a suspect by displaying said photographs to a victim of, or a witness to, a crime which would be a felony, whether or not the juvenile suspect is then in custody?

2. Does § 39.03(6), F. S., permit the law enforcement agency or sheriff's department to hold a lineup on a juvenile suspect utilizing other juveniles in custody?

3. Does § 39.03(6), F. S., permit the above-mentioned lineup to be photographed?

4. Does § 39.03(6), F. S., permit the use of the photographic display mentioned in question 1, or the lineup photograph mentioned in question 2, assuming each is otherwise admissible, to be used as evidence in the criminal trial of a juvenile in a court of record?

#### AS TO QUESTION 1:

The language of § 39.03(6), F. S., compels a negative answer to this question. The law expressly states that the department of law enforcement "shall use these fingerprints and photographs only for the purpose of making an identification." The law enforcement agency having custody of juvenile fingerprints and photographs is subject to the same restrictions concerning their use as the department of law enforcement. I do not believe that the law contemplates that the department of law enforcement, as part of its duties, will display photographs to a victim or other witness for the purpose of making an identification. This question contemplates the use of photographs other than that of the suspect juvenile. Here again, we run into difficulty. The law says that such photographs shall be kept in a separate file and shall not be subject "to use by anyone other than officials of law enforcement agencies, the juvenile court, the child, the parents or legal custodians of the child, or their attorneys." Additionally, the photograph of a juvenile "shall not be a public record." I quote the concluding sentence of § 39.03(6)(b), F. S.

... These fingerprints and photographs shall not be public records, and *no copies shall be made available to any person or agency at any time*, except as otherwise provided pursuant to this subsection or for good cause shown upon order of the juvenile court. (Emphasis supplied.)

It is my opinion that the entire statute is permeated with an intent to prohibit any person from seeing the photographs of juveniles other than law enforcement agencies. I see only one possible way that what you suggest in this question might be accomplished. This would be by securing an order based on "good cause being shown" permitting the law enforcement agency to display the photograph of a suspect juvenile to a victim or other witness for identification purposes only. I express no opinion as to whether a juvenile judge would or should issue such an order. Question 1 is, therefore, answered accordingly.

#### AS TO QUESTION 2:

The law does not provide for the holding of a lineup on a juvenile suspect utilizing other juveniles in custody. I think this is a proper construction of the law, particularly in view of § 39.03(3), F. S., which reads in part as follows:

The person taking and retaining a child in custody shall notify the parents or legal custodians of the child and the principal of the school in which said child is enrolled at the earliest practicable time, *and shall, without delay for the purpose of investigation or any other purpose*, deliver the child, by the most direct practicable route, to the court of the county or district where the child is taken into custody . . . (Emphasis supplied.)

It is my opinion that the above-quoted language, together with the tenor of § 39.03(6), F. S., as amended by Ch. 69-113, Laws of Florida, compel a negative answer to question 2.

#### AS TO QUESTION 3:

This question, in view of my answer to your question 2, must be answered in the negative.

#### AS TO QUESTION 4:

In view of my answers to questions 3 and 4, this question must be answered in the negative.

069-113—November 24, 1969

#### FACSIMILE SIGNATURES

##### USE ON NOTICE AND SATISFACTION OF TAX LIENS— DIVISION OF LABOR AND EMPLOYMENT OPPORTUNITIES OF THE DEPARTMENT OF COMMERCE

To: Ray C. Osborne, Lieutenant Governor, Tallahassee

#### QUESTIONS:

1. May the clerk of the circuit court refuse to accept and record an original notice of tax lien or an original satisfaction of tax lien of the department of commerce, when the same bears the official impression seal of the department and the facsimile signature of the director of the division of labor and employment opportunities?

2. Does the fact that the director has complied with § 116.34, F. S., relating to facsimile signatures, have any bearing on your answer to question 1?

Replying to your first question, your attention is directed to the provisions of § 443.15(3)(a), F. S., which authorizes the department of commerce as successor to the Florida industrial commission under governmental reorganization, §§ 20.17(4), 20.33 and 20.06(3), F. S., to issue a notice of lien "under its official seal" which upon presentment of said notice of lien the clerk of circuit court shall record in a book maintained by him for such purposes.

As you can see from the foregoing no signature is required on the notice of the tax lien and thus if the signature of the secretary of the department of commerce were affixed by facsimile it would only be surplus insofar as the requirements of the statute are concerned. The important thing with regard to the notice is that it be issued under the seal of the department of commerce, as successor to the commission.

Section 443.15(3)(a)1., F. S., further provides, with relation to the *satisfaction of a lien*:

. . . [T]he same may be satisfied of record by the division by

an acknowledgment under the seal of the division that such lien has been fully satisfied. Such satisfaction need not be acknowledged before any notary or other public officer and the *seal of the division together with the signature of the director* shall be conclusive evidence of the satisfaction of said lien, *which satisfaction shall be recorded* by the clerk of the circuit court . . . ." (Emphasis supplied.)

The statute referred to above does not provide any method of affixing the seal or the signature of the head of the department to the satisfaction of lien. Thus, it would appear that a facsimile signature would not be prohibited by the secretary of the department of commerce or by persons to whom he may delegate authority to use such facsimile. Hence, it appears that the decision reached in AGO 065-104, Sept. 16, 1965, Biennial Report of the Attorney General, 1965-1966, p. 152, and in *State v. Hickman*, 189 So.2d 154, should control this question.

In *State v. Hickman*, the Dist. Ct. of App. 2nd Dist. held that a facsimile signature may be affixed to a document by someone other than the person whose signature it purports to be if such facsimile signature is affixed upon the authority or direction of the person whose signature it purports to be and in such person's presence. In that case constructive presence was held to be sufficient.

Attorney General's Opinion 065-104, cited above, also concluded that a facsimile signature could be used by public officials, in that case by a supervisor of elections, since the statute did not appear to require the personal signature of the supervisor on the elector's registration identification card.

Attorney General's Opinions 063-108, Aug. 14, 1963, Biennial Report of the Attorney General, 1963-1964, p. 159, and AGO 067-6, Feb. 3, 1967, Biennial Report of the Attorney General, 1967-1968, p. 9, referred to in your inquiry, have been noted. They appear, however, to apply to originally signed carbon copies under the uniform commercial code and are not applicable to the instant situation.

Based upon the above, it appears that a facsimile signature is definitely not required or precluded on a notice of tax lien filed under § 443.15(3), F. S., and a facsimile signature may be used on a satisfaction of lien as discussed in the *Hickman* case, *supra*, and AGO 065-104, cited above. It further appears that § 116.34, F. S., is not applicable to notice of such liens and the satisfaction thereof. Your questions are answered accordingly.

069-114—November 24, 1969

# MOTOR VEHICLES LICENSE REQUIREMENTS FOR MOTOR-DRIVEN CYCLES AND THEIR OPERATORS—IN- SPECTION REQUIREMENTS

To: Don R. Watson, Sheriff, Monticello

## QUESTIONS:

1. Are mini-bikes which are propelled by gasoline engines of less than five brake horsepower required to be registered and licensed when operated upon the public streets and highways of Florida?
2. Are minors and adults required to be licensed in order to

operate mini-bikes on highways and streets of Florida?

3. Are motor-driven mini-bikes required to be inspected if operated on public streets and highways of Florida?

#### AS TO QUESTION 1:

Section 320.01(1), F. S., defines "motor vehicle" as including motorcycles and all other vehicles operated over the public highways and streets of Florida which are propelled by power other than muscular power.

Section 320.01(20), F. S., provides that a motor-driven cycle "shall be construed to mean every motorcycle, including every motor scooter, with a motor which produces not to exceed five brake horsepower, and every bicycle with motor attached."

Section 320.02, F. S., requires every owner or person in charge of a motor vehicle operated or driven upon the highways of this state to register the same with the department of highway safety and motor vehicles and purchase a license plate according to the schedule as provided in § 320.08, F. S., the pertinent provisions which are applicable to your question being as follows:

##### (1) MOTORCYCLES.—

(a) "A" Series: All motorcycles: \$10.00 flat.

(b) "R" Series: All motor-driven cycles which are certified by the manufacturer not to exceed 5 brake horsepower: \$10.00 flat.

It appears that any motor-driven cycle, regardless of its size, shape, or name, must be registered with and licensed by the department of highway safety and motor vehicles when used or operated upon the public highways and streets of Florida for the purpose of transporting persons or property. If it is assumed that a mini-bike is a small two-wheel cycle propelled by a motor of not more than five brake horsepower, it would be required to be licensed and to display an "R" series tag as set forth under the provisions of § 320.08(1)(b), F. S., when operated upon the streets and highways of Florida. This is a flat \$10.00 tag. Your first question is answered in the affirmative.

#### AS TO QUESTION 2:

Section 322.03, F. S., provides that no person, except those exempted in § 322.04, F. S., shall drive or operate any motor vehicle upon a highway of this state unless such person has a valid driver's license. The exemptions contained in § 322.04, F. S., are those employees of the U. S. government while operating U. S. government vehicles on official business; persons operating road machines, farm tractors, or implements of husbandry; and nonresidents who are properly licensed in their home state.

A motor vehicle, as defined in § 322.01(2), F. S., is "Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

Street or highway as defined in § 322.01(10), F. S., is "The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel."

Section 322.05, F. S., as amended by Ch. 67-174, Laws of Florida, prohibits the issuance of a driver's license to any person under 16 years of age, except that a restricted license may be issued to those persons who are at least 15 years of age. Restricted licenses issued to those



persons under 16 years of age prohibit nighttime driving and require that the driver be accompanied, on the front seat, by a licensed operator or chauffeur at least 21 years of age. However, the provisions of § 322.16(2), F. S., authorize the issuance of a special restricted license to those persons 15 years of age for the operation of a motorcycle, motor scooter, and bicycle with motor attached, provided the motors do not exceed five brake horsepower.

Applications of persons under 18 years of age for licenses must, under § 322.09, F. S., be signed by the applicants' parents, if living, who assume the obligations of any negligent or willful misconduct of the minor while operating a motor vehicle.

Section 322.12(2), F. S., requires the department of highway safety and motor vehicles to give every applicant for a restricted driver's license an examination which "shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic and his knowledge of the traffic laws of this state . . ."

All statutes and ordinances regulating traffic, unless otherwise specifically provided, are applicable to motored cycles.

Therefore, based upon the aforesaid statutes, a driver's license is required for the operation of any type of self-propelled cycles when operated upon the highways and streets of Florida. Your question is answered in the affirmative.

#### AS TO QUESTION 3:

Section 325.12, F. S., provides that every motor vehicle registered or required to be registered in the State of Florida shall display a current safety inspection certificate when operated upon any street or highway within Florida.

Section 317.981, F. S., makes it unlawful for any person to ride on a motorcycle or motor-driven cycle unless he rides on a seat permanently attached to such vehicle and wears "a crash helmet and protective safety mask, protective safety glasses or protective safety goggles at all times such vehicle is in motion." The constitutionality of this statute has been upheld by the Sup. Ct. of Fla. in an opinion filed Oct. 15, 1969, in the case of *State of Florida v. Eitel et al* 227 So.2d 489.

Therefore, motor-driven mini-bikes and all other motor-driven cycles are required to comply with the inspection provisions of Ch. 325, Part II, F. S., when operated upon the streets and highways of Florida and the operator must wear a crash helmet and protective safety mask, protective safety glasses or protective safety goggles. The mini-bikes and motor-driven cycles unable to meet the inspection provisions of Ch. 325, Part II, F. S., should not be operated upon the highways of Florida. Your question is answered in the affirmative.

069-115—December 1, 1969

#### LICENSE TAX

#### NONPROFIT SCHOOLS, EXEMPTION FROM LICENSE REQUIREMENTS OF CH. 205, F. S., AND CH. 67-1320, LAWS OF FLORIDA, CHARTER FOR THE CONSOLIDATED CITY OF JACKSONVILLE

To: John Crider, State Representative, Jacksonville

#### QUESTION:

1. Is a kindergarten which is operated on a nonprofit basis by the Baptist church subject to the license tax imposed by § 205.491, F. S.?

2. Does Section 69-515-387, City Code of Jacksonville, imposing a license tax on the same type of educational institution as § 205.491, F. S., violate any provision of the State Const., or the Jacksonville City Charter?

On the facts given, both questions are answered in the negative.

Section 205.491, F. S., imposes a \$15.00 license tax on educational or training institutions only if they are engaged in operation for profit. Schools operating on a nonprofit basis are therefore excluded by the terms of the law. In *Miami Beach College Corp. v. Tomlinson* (1940), 143 Fla. 57, 196 So. 608, the court noted that the nonprofit status of such an educational institution is to be determined by an objective evaluation of the school's operations and not from charter recitals. Assuming the kindergarten in question is in fact nonprofit as stated in your letter, it would apparently be excluded from the tax imposed by the statute.

Under Art. VIII, § 6(e), State Const., the Consolidated City of Jacksonville may be granted all the powers which cities and counties may exercise under general law. Sections 3.01 and 23.03, Ch. 67-1320, Laws of Florida, the Consolidated City Charter, so define the City's powers, and § 167.43, F. S., authorizes the imposition of license taxes by cities generally.

By § 3.02, 2. of Ch. 67-1320, Laws of Florida, the Consolidated City of Jacksonville is authorized to levy and collect license taxes except when prohibited by law. The repeal of § 205.02, F. S., by § 2 of Ch. 67-433, Laws of Florida, does not constitute an express prohibition against such license taxes as were formerly imposed by § 205.02, F. S. Assuming the constitutional validity of Ordinance 69-515-387, in accordance with the usual rule precluding determination of such issues by this office, § 41 of the ordinance appears to be a proper exercise of the powers granted to the City under its charter. See *Jackson v. Consolidated Govt. of City of Jacksonville*, Fla. 1969, 225 So.2d 497.

069-116—December 1, 1969

#### CITIES AND TOWNS

##### MUNICIPAL ANNEXATION BY GENERAL LAW AUTHORIZED— CHARTER AMENDMENT BY ORDINANCE PROHIBITED

To: *Gilbert T. Brophy, Lantana Town Attorney, Palm Beach*

#### QUESTION:

May a municipality amend its charter by ordinance to authorize annexation?

It is assumed for the purposes of this opinion that the municipality does not intend to proceed under the provisions of Ch. 171, F. S., or any special legislation authorizing annexation by the municipality.

Your attention is directed to Art. VIII, § 2(c), State Const., which provides that:

Municipal annexation of unincorporated territory, merger of municipalities, and exercise of extra-territorial powers by municipalities shall be as provided by general or special law.  
(Emphasis supplied.)

In addition, § 1(1), Ch. 69-242, Laws of Florida (§ 166.17(1), F. S.), provides:

The governing body of any municipality may, by ordinance

passed by a three-fifths (3/5) vote of the governing body, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter *except that part describing the boundaries of such municipality.* (Emphasis supplied.)

While Art. VIII, § 2, State Const., and said § 1(1), Ch. 69-242, Laws of Florida, permit municipalities to amend their city charters by the home rule process, these provisions do not authorize the use of the home rule process with regard to annexation.

Based upon the above and foregoing authorities, your question is answered in the negative.

069-117—December 1, 1969

#### TAXATION

#### REAL PROPERTY ASSESSMENTS—1970 TAX ROLLS FROZEN AT 1969 VALUATIONS

To: Alton M. Towles, County Attorney, Quincy

#### QUESTION:

May the tax assessor add such updated valuations to his 1970 tax roll in view of Ch. 69-255, Laws of Florida[§ 193.382, F. S.]?

Under the provisions of Ch. 69-255, Laws of Florida[§ 193.382, F. S.], your question is answered in the negative. The act states: "The values assessed on the counties' 1969 real property tax rolls . . . shall, . . . be the values assessed against all real property in the counties for the ensuing biennium. . . ." This language constitutes a clear legislative mandate to freeze the 1970 tax roll at the 1969 valuations. The terms employed are clear and unambiguous and leave no basis for construction. *Southeastern Utilities Service Co. v. Redding*, 131 So.2d 1 (Fla. 1961).

The succeeding provision of the act indicates that the provision above-quoted is intended to initiate a plan to have ad valorem tax assessments based on biennial valuation: "... All real property in the various counties shall be valued in accordance with F. S. [§ 193.021][§ 193.011], or F. S. [§ 193.201][§ 193.461] biennially, commencing with the 1970 tax roll."

In the context of the act, it seems apparent that the phrase "commencing with the 1970 tax roll" applies only to the time for commencement of the first biennium in the plan for biennial in place of annual valuation. It is not intended to require revaluation in 1970 under the cited statutes. The latter interpretation would, contrary to primary rules of statutory construction, result in directly conflicting provisions within the same law.

I would accordingly advise that, assuming Ch. 69-255, Laws of Florida[§ 193.382, F. S.], to be a valid and effective legislative enactment, the tax assessor for Gadsden County may not place on the 1970 tax rolls any valuation different from that assessed on the 1969 tax roll except as provided in the subject act with reference to adjustments as a result of natural disaster.

069-118—December 1, 1969

## MUNICIPAL FUNDS

CITY OF TAMPA—AUTHORITY TO USE FOR POLICE  
PROTECTION AND CERTAIN SERVICES FOR  
FLORIDA STATE FAIR

To: William Reece Smith, Jr., City Attorney, Tampa

## QUESTION:

May the City of Tampa validly appropriate funds for the purpose of providing police protection and garbage and trash service for the Florida State Fair?

It appears that the city has leased city-owned land to a nonprofit organization for holding the Florida State Fair in Tampa and that the city has agreed to provide such police protection and garbage collection service at the fairgrounds as, in its discretion, is reasonably necessary and as it would ordinarily be required to afford the public as a matter of law. Upon the termination of the lease, the buildings and improvements constructed at the fairgrounds by the lessee will become the sole property of the city. The city has express legislative authority to lease city-owned land for, and to make contributions of money or property to assist in, the holding of a public fair. Section 616.11, F. S. (enacted in 1917 as Ch. 7388).

In these circumstances, it seems that neither Art. VII, § 9, State Const. (providing that the Legislature may authorize cities to levy taxes for a municipal purpose) nor Art. VII, § 10, State Const. (prohibiting the pledging of credit to an individual or corporation by the state or any of its political subdivisions) of the 1968 State Const., would be violated by the use of municipal funds for the purposes in question.

The legislative determination made by Ch. 616, F. S., that a public fair is a county and a city purpose, while not conclusive, is persuasive. See *Jordan v. Duval County*, 68 Fla. 48, 66 So. 298; cf. *State v. Town of North Miami*, Fla. 1952, 59 So.2d 779. A public fair has been judicially determined to be a valid county purpose. See *Earle v. Dade County*, Fla. 1926, 109 So. 331; *State ex rel. Barnett National Bank v. Thursby*, Fla. 1933, 150 So. 252. It was held in *Earle v. Dade County*, above, that the vital interest of the public in the proper functioning of the agricultural interests of the state was sufficient to justify the issuance, under legislative authority, of bonds by the county to finance the construction of public fair buildings; and this reason appears to be equally applicable to a determination of the question of the propriety of contributing municipal funds to assist in holding a public fair. Additionally, the economic value to the city from the influx of visitors to attend the Florida State Fair seems to justify the relatively minor expenditure for police protection and garbage service that is involved here. The Supreme Court has upheld the expenditure of municipal funds for such purposes as an auditorium, stadium, warehouse, Inter-American cultural and trade center, international trade mart and a convention center. See *State v. City of Tampa*, Fla. 1962, 146 So.2d 100, and cases cited. And there is little, if any, doubt that the Florida State Fair could also be approved as a valid beneficiary of municipal funds. There is, in my opinion, no violation of Art. VII, § 9, State Const.

The fact that the Florida State Fair is to be organized and conducted by a private nonprofit corporation does not make the city's contribution unlawful under Art. VII, § 10, State Const. See *Raney v. City of Lakeland*, Fla. 1956, 88 So.2d 148, and *State v. City of Miami*, Fla.



1954, 72 So.2d 655. As noted above, the buildings and improvements made by the lessee will revert to the city upon the termination of the lease, and there is no suggestion that the lessee-nonprofit organization will derive any pecuniary gain from its activities anent the Florida State Fair. There appears to be no violation of Art. VII, § 10, State Const.

Your question is answered in the affirmative.

069-119—December 3, 1969

**MUNICIPALITIES  
OFFICERS—SUSPENSION UNDER INDICTMENT—  
REELECTION**

To: *Herbert Z. Marvin, City Attorney, Florida City*

**QUESTIONS:**

1. May the chief of police, who is an elected public official in Florida City, and who is presently under indictment by the Dade County grand jury for conspiracy to commit bribery, qualify to run for the same office of chief of police while the indictment is pending?
2. If the chief of police can qualify to run for office under the circumstances mentioned in Question 1, and he is duly elected, can he hold office during his newly elected term without being suspended by the governor?

It appears that there are no provisions in the city charter or in the city ordinances of Florida City applicable to the problem and that the incumbent chief of police has been suspended by the governor under the authority of Art. IV, § 7(c), 1968 State Const., and Ch. 69-256, Laws of Florida (§ 166.16, F. S.). The organic authority (which was new in the 1968 State Const.) is couched in the following terms:

By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter.

The constitutional provision prescribes the procedure for filling the temporary vacancy in office so created, the steps to be taken by the governor upon an acquittal or conviction of the indicted municipal official, and the official's rights upon an acquittal.

Other relevant provisions of statutory and constitutional law are Art. VI, § 4, 1968 State Const., (formerly Art. VI, § 5, State Const. of 1885), prohibiting a *convicted* felon from holding public office "until restoration of civil rights;" and § 112.01, F. S., providing that all persons convicted of an infamous crime such as bribery, larceny, and the like, are disqualified from holding public office but that "the legal disability shall not accrue until after trial and conviction by due form of law."

Article VI, § 5, State Const. of 1885, and § 112.01, F. S., have been interpreted in cases involving county officials who were indicted for an infamous crime or suspended from office by the governor under the authority of Art. IV, § 15, State Const. of 1885 (now appearing, as reworded, in Art. IV, § 7(a) and (b), 1968 State Const.). It is settled that it is not the *indictment* that disqualifies a person from holding office under the constitutional and statutory provisions referred to above—it is the *conviction* of the offense that does so. See *In re Advisory Opinion*

to the Governor, 1918, 75 Fla. 674, 78 So. 673. Therefore, until a person charged with a felony has been actually convicted and the time for an appeal from the judgment of conviction has expired, he may qualify for and run for public office. See AGO 060-45, Mar. 8, 1960, Biennial Report of the Attorney General, 1959-1960, p. 510, and authorities cited.

Nor does the suspension from office affect his right to run for office. As stated In re Advisory Opinion to the Governor, 1893, 31 Fla. 1, 12 So. 114,

A suspension or removal not having of itself the effect to taint the person or officer, either while suspended or after removal, with any disqualification to hold any office, we are unable to see how it can affect his right to exercise the functions of a future term of the same office. He is as qualified for or as eligible to election to a future term pending the suspension, or after the removal, as he was before the suspension.

You are advised, therefore, that the chief of police of Florida City may qualify to run for reelection to the office while under indictment and suspension by the governor.

The question of whether the governor may suspend a reelected official on account of prior misconduct during a preceding term of office is not so readily answered. The courts of this country are in sharp conflict on this question. See the cases cited in the annotations in 17 A.L.R. 279 and 138 A.L.R. 753. The Sup. Ct. of Fla. has held that the governor may not "veto" the choice of the electorate by suspending a reelected official for prior misconduct that was "known and condoned" by the electorate when they reelected him to the office, although it has also held that this rule does not apply to neglect of duty that existed in a preceding term and continued into the term for which he was reelected. See *State ex rel. Hardee v. Allen*, 1937, 172 So. 222; In re Advisory Opinion to the Governor, 1912, 64 Fla. 168, 60 So. 337. The 1969 Legislature may have changed the rule first mentioned above by providing in Ch. 69-277, Laws of Florida (§ § 112.40-112.48, F. S.), that the governor may suspend an official on a constitutional ground occurring during his existing term "or during the next preceding four years" of an official term, as to which no opinion is expressed.

The context in which the question is presented here is, however, not the same as that in which the cases referred to above, relating to the suspension of county officials, were decided. The governor's power of suspension over county officials derived from Art. IV, § 15, State Const. of 1885, could be exercised by him regardless of whether the official had been informed against or indicted for the malfeasance in office for which he was suspended. Under the 1885 constitutional provision in question, the governor's suspension continued until the adjournment of the next session of the senate. If at that time the senate had failed to take action upon the suspension, the suspended official was automatically reinstated in office. It was held in In re Advisory Opinion to the Governor, above, 12 So. 114, that a suspension pursuant to this constitutional provision "... is confined in its legal effect, as it is in fact, to the term of office existing at the time the suspension was made ..." and that the suspension was ineffective to prevent the suspended incumbent from taking office for the new term to which he was reelected.

The constitutional and statutory provisions respecting the governor's suspension of a municipal official are entirely different. See Art. IV, § 7(c), State Const., and § 166.16, F. S. The power to suspend is limited

to municipal officials who have been *indicted for crime* by a grand jury. And the organic mandate is that the indicted official "may be suspended from office *until acquitted*..." (Emphasis supplied.) Regardless of whether the power of suspension granted to the governor is deemed to be permissive or mandatory, it seems clear that the suspension of an indicted municipal official must continue until he is either acquitted or convicted. If convicted, the governor "shall remove such municipal official from office." (§ 166.16(4), F. S.) If acquitted, "the governor shall forthwith revoke the suspension and restore such municipal official to office..." (§ 166.16(5), F. S.) That this was the clear intent of the framers of this particular constitutional provision is supported by the terms of § 166.16(5), F. S., in which provision is made for reimbursement of the suspended official if he is acquitted of the charge for which he was indicted and suspended. It is there provided that the acquitted official is entitled to his full back pay and emoluments

... for the full period of time of his suspension. If *during his suspension* the term of office of such municipal official expired and a successor was either appointed or elected, then such back pay, emoluments, or allowances shall only be paid for the duration of the term of office during which the municipal official was suspended under the provisions of this section, and he shall not be reinstated. (Emphasis supplied.)

The fact that the appointment to fill the temporary vacancy created by the suspension is expressly limited by Art. IV, § 7(c), State Const., to "the period of suspension, not to extend beyond the term," does not require a different conclusion. This provision was obviously intended to cut off the term of the temporary appointee so that the person elected to the office at the preceding general election (if other than the suspended incumbent) could assume the duties of the office. If the suspended incumbent should be reelected to the office, he cannot assume the duties of the office unless and until he is acquitted, so that another temporary appointment to fill the vacancy would have to be made.

In summary, a suspended indicted municipal official may run for reelection during the pendency of his indictment and suspension until he has been finally convicted of the charges made against him. If reelected, he may not assume the duties of the office unless and until he is acquitted of the charges. This being so, the second question posed by you is moot.

069-120—December 3, 1969

#### TAXATION

#### INTANGIBLE PERSONAL PROPERTY TAX ROLL; PUBLIC RECORDS; DISCLOSURES

To: Earl K. Wood, Tax Collector, Orlando

#### QUESTION:

May microfilm records of intangible personal property tax roll be made public?

Section 199.101, F. S., forbids not only public inspection of intangible personal property tax returns, but also prohibits divulging the *contents* of such returns, except total value and tax, and it provides for their return or destruction after payment of the tax:

*...No officer examining such return shall divulge their contents, other than the total value and tax thereon, or make or permit to be made any copy or list therefrom.* When any intangible personal property tax or assessment shall have been paid, it shall be the duty of the tax assessor to return and deliver to the taxpayer at his request, the original intangible personal property tax return or returns of the taxpayer upon or in connection with which such intangible personal property taxes shall have been assessed and levied. If a taxpayer shall not request the surrender of his intangible personal property tax return after having paid his intangible personal property tax, it shall be the duty of the tax assessor to destroy all intangible personal property tax returns filed with him within three years after the same shall have been paid. (Emphasis supplied.)

It is clear that compliance with the terms of this statute requires that such contents, including all information other than total value and tax, wherever the information may be recorded, shall remain confidential unless the tax becomes delinquent, and your question is answered in the negative to this extent. An opinion of my predecessor, AGO 058-272, Sept. 17, 1958, Biennial Report of the Attorney General, 1957-1958, p. 817, stating that this statute refers only to the return itself, was based on the right of inspection of public records under §119.01, F. S. That law has now been altered by the addition of the following provision by § 7, Ch. 67-125, Laws of Florida (§ 119.07, F. S.), effective date May 30, 1967:

(1) Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law.

(2) (a) All public records which presently are deemed by law to be confidential or which are prohibited from being inspected by the public, whether provided by general or special acts of the legislature or which may hereafter be so provided, shall be exempt from the provisions of this section.

(b) All public records referred to in §§ 794.03, 198.09, 199.101, 658.10(1), 624.0118(3), (4), 624.0110(2), and 72.27[63.181], Florida Statutes, are hereby exempt from the provisions of this section. (Emphasis supplied.)

The earlier opinion is accordingly limited or amended to give effect to the language above-quoted from §199.101, F. S., protecting the contents, i.e. information and data, obtained from the return. See also *Maxwell v. Pine Gas Corp.*, Fla. App. 4th Dist., 195 So.2d 602, recognizing the confidential nature of intangible personal property tax records prior to the effective date of § 119.07.

Under the terms of the statute only "the total value and tax [including penalty] thereon" can be divulged, subject only to delinquency procedures. Inspection or copying of the intangible personal property tax roll is therefore prohibited when such inspection would result in divulging information contained on the returns other than that expressly mentioned.



069-121—December 4, 1969

STATE EMPLOYEES  
EMPLOYMENT REQUIREMENTS, LOYALTY OATH—  
ELIGIBILITY OF NONCITIZENS

To: State Department of Education, Tallahassee

QUESTION:

Does the loyalty oath required by § 876.05, F. S., reciting that the person taking the oath is a "citizen" of this state and the United States have the effect of prohibiting the employment of a noncitizen; and, if not, may that portion of the loyalty oath be deleted by a noncitizen executing the same?

A history of the statute in question and other laws relating to employment in state and local government and in the schools of this state shows clearly that the loyalty and anticommunist oath requirement was not intended to prohibit employment of noncitizens.

Section 876.05, F. S., was adopted in 1949 (Ch. 25046, Laws of Florida, 1949) to prescribe the so-called loyalty and anticommunist oath to be taken by all persons then or thereafter employed by the state or any county, city, school board, school district, or institution of higher learning and all candidates for public office. The oath recites that the employee or applicant for employment is "a citizen of the State of Florida and of the United States of America" and that the affiant does "... hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party ...."

Long before the enactment of § 876.05, F. S., it had been a requirement for employment as a teacher in the public schools of this state that the applicant be a United States citizen. The Florida School Code of 1939 so provided. Section 517 of Ch. 19355, Laws of Florida, 1939, now appears as § 231.17, F. S. Some four years later, however, § 231.17 was amended to authorize the employment of "citizens of other friendly nations who are assigned to teach in the state on an exchange basis or who may be needed to teach foreign languages. ..." (Ch. 21989, Laws of Florida, 1943.) It should be noted, parenthetically, that the wording of this portion of § 231.17 has been changed somewhat by subsequent amendments, quoted *infra*. Moreover, even prior to the enactment of § 876.05, F. S., an applicant for a teacher's certificate was required to take a loyalty oath by filing "along with his other credentials a written statement under oath that he subscribes to and will uphold the principles incorporated in the constitution of the United States." § 20 of Ch. 23726, Laws of Florida, 1947, carried forward as § 231.18, F. S., 1949, and now incorporated in § 231.17(1)(b), F. S. But it was expressly provided by the same amendatory act that the loyalty oath requirement should not apply to the noncitizen teachers employed under the authority of § 231.17, F. S. Section 19 of Ch. 23726, Laws of Florida, 1947, amended § 231.17, F. S.

It can thus be seen that, at the time of the adoption in 1949 of § 876.05, F. S., to provide for the loyalty and anticommunist oath, the state board of education was expressly authorized by statute to issue teaching certificates or permits to noncitizens and to allow them or, at least, those employed on an exchange basis, to become certificated without taking the loyalty oath prescribed by § 231.18, F. S., 1949[§ 231.17(1)(b), F. S.]. The question of the impact of § 876.05, F. S., on the qualifications of noncitizen teachers employed at that time

and thereafter to be employed to teach in our schools was soon presented to this office. In AGO 049-243, June 7, 1949, Biennial Report of the Attorney General, 1949-1950, p. 591, written to the board of control concerning noncitizen instructional personnel employed at Florida State University, it was pointed out that the purpose of § 876.05 was to prohibit and penalize the employment in this state of members of the communist party and that it was not intended to limit public employment in this state to citizens of Florida and the United States. Noting that the words "a citizen of the State of Florida and of the United States of America" were used merely as *descriptio personae* and not as a requirement for employment, it was suggested that

... [I]f the employee is not a citizen of this country, he may substitute for the quoted words a statement that he is a citizen of whatever country he may be a citizen. It would be appropriate to add, if such be the case, that he has applied for citizenship in the United States or intends to apply for citizenship in the United States, or whatever the facts may be....

In a subsequent opinion, AGO 049-294, July 5, 1949, Biennial Report of the Attorney General, 1949-1950, p. 594, to the board of county commissioners of Dade County, it was reiterated that the words of the loyalty and anticommunist oath quoted above were merely descriptive, but it was declared, also, that the oath to support the constitutions of Florida and of the United States was "a vital part of the oath" and could not be omitted. See also AGO 061-83, May 18, 1961, Biennial Report of the Attorney General, 1961-1962, p. 134, advising that a Cuban refugee may be issued a teaching certificate; and AGO 062-151, Nov. 8, 1962, Biennial Report of the Attorney General, 1961-1962, p. 618, advising that Cuban refugees employed full time as teachers' aides were eligible for retirement benefits under Ch. 238, the teachers retirement Act.

Legislative enactments subsequent to 1949 respecting the employment of citizens of other states and nations to teach in our schools make it clear that there was no intention to prohibit noncitizens from teaching in this state. The relevant portion of § 231.17, F. S., has been reenacted and reworded several times since 1949, and, as presently existing, provides as follows:

(2) The state board shall have authority to prescribe regulations under which certificates may be issued to noncitizens who may be needed to teach or who may be assigned to teach in the state on an exchange basis; provided, that the filing of a written oath to uphold the principles of the constitution of the United States referred to above shall not apply to individuals assigned to teach on an exchange basis.

(3) No certificate shall be issued to a citizen of a nation controlled by forces which are antagonistic to democratic forms of government, except to an individual classified as a refugee from another country or as a resident alien from Cuba, who has been legally admitted to the United States through the immigration and naturalization service.

While the provisions of § 231.17(2) and (3), F. S., apply in terms only to the employment and certification of noncitizens to teach in the public schools of this state, as distinguished from institutions of higher learning, as to which there are no statutory certification requirements, it seems that the policy thereby established for employment of noncitizens in the public schools would be applicable to, and could well be adopted

by rules and regulations for, the employment of instructional personnel in our institutions of higher learning.

Accordingly, insofar as the instructional personnel of the public schools and institutions of higher learning of this state are concerned, noncitizen teachers may take the loyalty and anticommunist oath by substituting for the words "citizen of the State of Florida and of the United States of America" other words that are descriptive of his or her citizenship or residence status; and, in the case of a noncitizen assigned to teach on an exchange basis, the applicant may also omit the oath to "support the Constitutions of the United States and of the State of Florida."

As to other state and local government employees required to take the oath prescribed by § 876.05, F. S., we find nothing to indicate that this statute has the effect of prohibiting a noncitizen from becoming a state or local government employee.

At the time of the enactment of § 876.05, F. S., there was a statutory requirement of two years' residence in Florida as a prerequisite to employment by the state or a county "except only where after due diligence no person can be found in the state possessing the required qualifications necessary to the particular employment." Section 112.02, F. S., 1967. This statute has now been repealed by Ch. 69-20, Laws of Florida; but at a time when it was still in effect, this office was called upon to construe the impact of § 876.05 upon those provisions of § 112.02, quoted above, authorizing state and county employment of noncitizens. In AGO 056-183, June 26, 1956, Biennial Report of the Attorney General, 1955-1956, p. 700, it was pointed out there was nothing in § 876.05 indicating that the legislature intended to repeal the provisions of § 112.02 authorizing the employment of citizens of other states and countries in the circumstances therein specified. It was further stated:

... We see no legal reason why an employee of the state [of Florida] or any of its departments or agencies, or of its subdivisions, counties, etc., may not take the oath of allegiance prescribed by making slight changes therein and using in lieu of the term "citizen" the term "resident" or otherwise as the case may be. The purpose of § 876.05 was to insure the loyalty of such employees to Florida and the U. S., and not to require that all such employees be citizens of Florida.

Chapter 69-20, Laws of Florida, repealed § 112.02, F. S., as well as § 947.08, F. S., requiring employees of the probation and parole commission to be two-year residents of this state, and stated the new policy of this state respecting government employment in a new § 112.021, F. S., as follows:

(1) There shall be no Florida residence requirement for any person as a condition precedent to employment by the state or any county.

(2) This section shall not apply to any person qualifying for an elected or appointed position.

The new § 112.021, F. S., and also, new §§ 112.041 and 112.042, F. S., prohibiting discrimination in government employment on account of race, creed, color, sex or national origin, are consistent with, and, in fact, appear to reinforce, the conclusions reached in AGO's 056-183, 049-243 and 049-294, mentioned above. Accordingly, a noncitizen who is otherwise eligible for government employment in this state may qualify for employment by taking the loyalty and anticommunist oath prescribed by § 876.05, F. S., after deleting therefrom and substituting therein

appropriate words for the words "citizen of the State of Florida and of the United States of America."

No question is presented as to the validity of the anticommunist portion of the oath, and no opinion thereon is expressed.

069-122—December 4, 1969

## OCCUPATIONAL LICENSES

### SPECIAL DISTRICTS—PURPOSE—REGULATION, REVENUE

To: *Ronald N. Johnson, Attorney, North Peninsula Zoning Commission, Daytona Beach*

#### QUESTION:

Does the North Peninsula Zoning Commission have the authority to charge an annual occupational license fee in the amount of \$60 for general contractors, and \$30 for subcontractors?

The North Peninsula Zoning Commission was authorized, by Ch. 61-2971, Laws of Florida, to regulate the construction industry within its district and to require certificates of competency, based on an examination, as a prerequisite to the issuance of permits for the construction or alteration of buildings in the district. Section 2 of said Act authorizes the Commission to charge fees in connection with the issuance of any of the aforementioned permits, certificates of competency, and examinations, and to fix the amount of fees to be charged by the said district. The Commission is also authorized to require, by § 20 of said Act the annual renewal of the certificate that it issues, and to charge a fee not to exceed similar charges made by the City of Daytona Beach, in connection with the issuance thereof.

Your letter states that the City of Daytona Beach requires a holder of a certificate of competency to procure an occupational license annually in order to renew such certificate of competency and that the amount charged a contractor for his occupational license is \$60; also that a subcontractor is required by the City of Daytona Beach to purchase annually an occupational license for which the fee is \$30, although subcontractors are not required by the City to hold certificates of competency.

Your letter does not make clear the origin of the doubt that stimulated your inquiry, but the referred fees of the City of Daytona Beach relate to a municipal revenue tax program rather than a licensing program, which is the area under which your Commission has authority to set and collect fees. A certificate of competency relates to the exercise of a police power to regulate a business, occupation or trade in order to protect the health, safety, and welfare of the public, while an occupational license is the exaction of licensing fees for revenue purposes in the exercise of the power of taxation held by a governmental agency or authority. See 21 Fla. Jur., Licenses and License Taxes, § § 7, 8, and 9; the latter states:

... In general, where license legislation imposes a fee for the purpose of regulation and requires compliance with certain conditions in addition to the payment of the prescribed sum, the sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment gives the right to carry on the business without any further conditions, it is a tax....



Accordingly, the City of Daytona Beach, having initially issued a certificate of competency to a general contractor, is no longer concerned with regulating his performance so long as the contractor evidences activities in his trade by annually paying the revenue tax imposed by the city through its occupational license fee of \$60. See *Tamiami Trail Tours, Inc. v. City of Orlando* (Fla. 1960), 120 So.2d 170.

As to subcontractors, by the information supplied us, they have no licensing requirements imposed, and thus, in the absence of regulating a subcontractor's performance, this, too, must be considered as being a revenue tax, rather than licensure. Cf. *Tamiami Trail Tours* case, above.

I refrain from rendering any opinion as to the propriety of the fee set by the commissioners of the North Peninsula Zoning Commission. This is a discretionary responsibility exercised under their quasi-legislative authority provided in § 2, Ch. 61-2971, Laws of Florida. See § 120.021(2), F. S.; *Meiklejohn v. American Distributors, Inc.* (1 Fla.App.1968), 210 So.2d 259, 264. However, as a guideline to the amount which might be set as a fee, the licensing fee can include the cost of administering the licensing program, issuance and renewal, supervision of the trade activities within the area controlled by the Commission, and all other incidental public expenses likely to follow from such business, occupation or trade so licensed by the authority to such an extent that the licensing program and fees imposed thereunder are not extended into a purely revenue-producing activity of the Commission. See *State ex rel. Reynolds v. City of St. Petersburg* (Fla.1938), 122 Fla. 366, 183 So. 304, 118 A.L.R. 667; *Atkins v. Philips* (1890), 26 Fla. 281, 8 So. 429; and *City of Jacksonville v. Ledwith* (1890), 26 Fla. 163, 7 So. 885.

Thus, insofar as § 20, Ch. 61-2971, Laws of Florida, places a limitation upon the fees set by the Zoning Commission, I suggest that the Zoning Commission avoid any situation which would indicate that its fees are based solely upon the fees for the revenue tax program of the City of Daytona Beach. Your question is answered accordingly.

069-123—December 5, 1969

#### HEALTH AND MEDICAL CARE PROGRAMS

##### PHYSICIANS' SERVICES—PAYMENTS; DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

To: *James A. Bax, Secretary, Department of Health and Rehabilitative Services, Jacksonville*

#### QUESTIONS:

1. Do the provisions of § 1, item 777, Ch. 69-100, Laws of Florida, implementing Title IX and Title XIX of the Social Security Law for the period of Jan. 1, 1970-June 30, 1970, limit payments for physicians' services to those payments made by the department of health and rehabilitative services for such services?

2. Does the prohibition against payment of physicians' services for routine physical and eye examinations as appears in § 1, item 777 of Ch. 69-100, Laws of Florida, apply to physical and eye examinations related to diagnostic or therapeutic examinations by physicians?

#### AS TO QUESTION 1:

I am advised of your concern as to whether the department of health

and rehabilitative services may enter into cooperative payment and referral arrangements with other state agencies responsible for, or involved in, health and rehabilitative services as required by § 1902(a) (11)(A)(B) of the federal social security act.

On Oct. 22, 1969, by letter addressed to U. S. Department of Health, Washington, D. C., the Attorney General advised that pursuant to Ch. 69-106, Laws of Florida, the department of health and rehabilitative services is the single agency of the state designated to administer resulting departments under programs of Title XIX of the social security act, as amended.

Programs of reorganization of the executive branch of state government authorized by the 1969 Legislature are the recipients of appropriations necessary to accomplish the purposes of such reorganization, § 16, Ch. 69-100, Laws of Florida. With reorganization of the executive branch, all health and medical care programs administered by the state department of public welfare under Ch. 409, F. S., were transferred to the department of health and rehabilitative services, § 19, Ch. 69-106, Laws of Florida (§ 20.19, F. S.)

Since the function of all agencies of the State in providing health and medical care programs to recipients under Ch. 409, F. S., by the state department of public welfare has been transferred to the department of health and rehabilitative services, the department as reorganized is the sole agency authorized to make payments for such services, and need for contract between the department of health and rehabilitative services and any other state agency to provide such services no longer exists. Question 1 is answered in the affirmative.

#### AS TO QUESTION 2:

When doubt exists as to the meaning of a statute, the purpose for which it was enacted is of primary importance in its interpretation. *United Bonding Ins. Co. v. Tuggie*, 216 So.2d 80.

In construing statutes, a court will consider not only language or words used in a statute, but also its history, its legislative setting, subject matter on which statute operates, the evil to be corrected and the objects to be obtained, all of which are as much a part of the law as the words themselves. *Dade Federal Sav. & Loan Ass'n v. Miami Title & Abstract Division of American Title Ins. Co.*, 217 So.2d 873.

The obvious purpose of the legislature was to assure that funds appropriated were used to provide necessary medical treatment for the sick, infirm, and disabled persons qualified for assistance under applicable state laws implementing Title XIX of the federal social security act.

It is my opinion that the legislature intended to limit the use of funds appropriated for physicians' services to the payment for such services in connection with diagnostic or therapeutic treatment, as distinguished from the routine annual physical checkup had by many individuals, and thus channel appropriated funds to provide physicians' services most needed by recipients under the program. Question 2 is answered in the negative.

069-124—December 9, 1969

#### PUBLIC HEALTH, WELFARE, AND MORALS

#### SUNDAY CLOSING LAWS—AUTHORITY TO ENACT—STATE, COUNTIES, AND MUNICIPALITIES

To: *Bill Gunter, State Senator, Orlando*

## QUESTION:

What is the constitutional authority of a state to enact Sunday closing laws?

It is almost universally held that a state—or its political subdivisions, with proper constitutional or statutory authority—may adopt a Sunday closing law. The right to do so does not derive from the state constitution, which, after all, is only a limitation on the exercise by a state of its sovereign powers, but from the inherent power of the state to legislate concerning the health, safety, and general welfare of its citizens.

A landmark case concerning Sunday closing laws is *McGowan v. Maryland*, 1960, 366 U.S. 420, 6 L.Ed.2d 393, 81 Sup. Ct. 1101, in which the validity of the Maryland Sunday closing law was upheld. In that case the court pointed out that Sunday closing laws go far back into American history, having been brought to this country by the colonists from England, where Sunday closing laws existed from the 13th century. Noting that Sunday closing laws were unmistakably religious in their origin in this country, but that they are now evidence of the state's concern for the health, safety, recreation, and general well-being of its citizens, the court said at p. 445:

Sunday closing laws . . . have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals.

Our research reveals that in the period 1956 to 1966, the Sunday closing laws of the following states were upheld as against various constitutional attacks upon them: Arkansas, Colorado, Connecticut, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Wyoming, West Virginia, Virginia, Texas, and Tennessee. See the Seventh Decennial Digest, under the topic "Sunday," Key 2 *et. seq.*

Florida's Sunday closing law, Ch. 855, F. S., was repealed by Ch. 69-87, Laws of Florida. However, prior to its repeal, in *Henderson v. Antonacci*, Fla. 1952, 62 So.2d 5, the court noted that:

. . . the closing of all business houses on Sunday, except in cases of emergency, bears a rational and reasonable relationship to the public health, safety, morals or general welfare because thereby protection is afforded all citizens from the evils attendant upon uninterrupted labor.

The court did, however, strike down a 1951 amendment to the Act because of exemptions made therein based on nebulous, wholly arbitrary distinctions without a reasonable basis for upholding them. See also *Moore v. Thompson*, Fla. 1960, 126 So.2d 543, upholding the validity of Sunday closing laws in general, but striking down Ch. 59-295, Laws of Florida, a Sunday closing law applicable only to new and used car dealers. A municipal ordinance of the City of St. Petersburg prohibiting the opening of motion picture theaters, cabarets and dance halls on Sunday was upheld in *Gilhooley v. Vaughn*, Fla. 1926, 110 So. 653, the court noting that municipalities of this state are authorized ". . . to pass all such ordinances and laws as may be expedient and necessary for the preservation of the public peace and morals." § 1839, RGS, now appearing as § 165.19, F. S.

Under these decisions, Florida is clearly and unambiguously aligned with the almost universal holding that a Sunday closing law is a proper exercise of the police power of the state and its political subdivisions that will be upheld unless it violates the equal protection or due process of law clauses of the federal and state constitutions.

As noted above, in 1969 the Legislature repealed the general statewide Sunday closing law, Ch. 855, F. S. During the same 1969 term it enacted Ch. 69-234, Laws of Florida (§ § 125.65, 125.69, F. S.), and Ch. 69-33, Laws of Florida (§ 167.005, F. S.), implementing the so-called "home rule" provisions of the State Const. for counties and cities, respectively. See Art. VIII, § § 1, 2, State Const. Under said Ch. 69-234 (§ 125.65(1), F. S.), the counties of this state "... shall have all powers of local self-government ... and may exercise any such power for county purposes, and the health, safety or welfare of its citizens not inconsistent with general or special law."

And under Ch. 69-33 (§ 167.005, F. S.), as well as § § 165.19 and 167.05, F. S., the municipalities of this state are authorized to adopt ordinances for the preservation of the public health, public peace and morals. It seems, therefore, that the 1969 Legislature intended to and did abdicate its right to legislate in the field of Sunday closing laws and turned over to each of the counties and cities of this state the right to make its own decision, based on local conditions and the best interests and desires of its own citizens and businesses, as to whether or not a Sunday closing ordinance should be adopted and, if so, the types of businesses and other establishments that should be closed—keeping in mind the constitutional requirements of equal protection and due process of law discussed in *Henderson v. Antonacci*, *supra*, 52 So.2d 5.

069-126—December 10, 1969

#### RETIREMENT

#### TEACHERS' SICK LEAVE—TERMINAL PAY— CONSTRUCTION OF TERM "NORMAL RETIREMENT"

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

#### QUESTIONS:

1. Is the Brevard County board of public instruction authorized to pay one half of accumulated sick leave under § 231.40(1)(c), F. S., to a teacher who "retires" after ten years of service at the age of 55 to enter business? The teacher will not start retirement benefits at this time.

2. If so, is a retired teacher eligible for the remaining one half should he return to the teaching profession before the age of 70?

Section 231.40(1)(c), F. S., states:

A school board may establish policies to provide terminal pay to a member of the instructional staff at normal retirement ...; provided, however, that such terminal pay shall not exceed an amount determined by the daily rate of pay of the member of the instructional staff at retirement ... multiplied by one half the total number of accumulated sick leave days credited to the member of the instructional staff at time of retirement ... (Emphasis supplied.)



So long as the payment in question conforms to the legislature's formula set out above, there should be no prohibition to the considered payment. The question for our determination, however, is whether the retirement described in your letter constitutes "normal retirement" within the contemplation of § 231.40(1)(c), F. S., quoted above. We are not left to guess what the term "normal retirement" comprises, since this is a phrase in much use and explicitly defined in Ch. 238, F. S., dealing with the retirement benefits of teachers. Since the concern of § 231.40(1)(c) is with a benefit to teachers at "normal retirement," it follows that this section must be read in the light of the retirement provisions of Ch. 238. Section 238.07(2)(e)1., F. S., states as follows:

(2) The provisions for the retirement of a member are as follows:

(e) To retire:

1. At *normal retirement* age which shall be age sixty for those persons whose membership date, or last renewal thereof, occurred prior to July 1, 1963, and age sixty-two for those persons whose membership date or last renewal thereof, occurred on or after July 1, 1963 . . . [.] (Emphasis supplied.)

In view of this language, it is my conclusion that § 231.40(1)(c), F. S., applies by its terms only to normal retirement of a member as described above and therefore the terminal pay provided in Ch. 231, F. S., would not be authorized for the teacher described in your question.

The above conclusion makes unnecessary an answer to your question 2 regarding the "remaining one half sick leave that was not paid to him."

069-127—December 11, 1969

#### TAXATION

##### AMENDMENT UNDER CHS. 69-33 AND 69-242, LAWS OF FLORIDA, OF CITY CHARTER PROHIBITING AD VALOREM TAX— ART. VIII, § 2(b), STATE CONST.

To: Gerald L. Brown, City Attorney, Gulf Breeze

#### QUESTION:

May the City of Gulf Breeze amend its charter to remove a prohibition against ad valorem taxation and to allow such taxes, under the provisions of Ch. 69-33 or Ch. 69-242, Laws of Florida (§ 167.005 or § 166.17, F. S.)?

Your question is answered in the affirmative, on the basis of constitutional and statutory provisions noted below. Section 1, Ch. 69-242, Laws of Florida (§ 166.17, F. S.), recently considered in AGO 069-116 of this publication, relating to municipal annexation, states in part:

(1) The governing body of any municipality may, by ordinance passed by a three-fifths (3/5) vote of the governing body, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to *any part or to all* of said charter except that part describing the boundaries of such municipality. (Emphasis supplied)

\* \* \* \* \*

(3) A municipality may amend its charter pursuant to this act notwithstanding any charter provisions to the contrary. This act shall be supplemental to the provisions of all other laws relating to the amendment of municipal charters.

This law appears to be supplementary to Ch. 69-33, Laws of Florida (§167.005(1), F. S.), which provides that municipalities "may exercise any power for municipal purposes, *except when prohibited by general or special law.*" Chapters 69-33 and 69-242, Laws of Florida (§§ 167.005 and 166.17, F. S.), were enacted in implementation of Art. VIII, §2(b), of the State Const., which provides that municipalities "may exercise any power for municipal purposes *except as otherwise provided by law.*" (Emphasis supplied.)

Neither Art. VIII, State Const., nor Ch. 69-33, Laws of Florida (§167.005, F. S.), would permit the exercise of the power of ad valorem taxation by the city so long as its charter prohibits such action, since both definitions of municipal power state that a power may not be exercised when *prohibited* Ch. 69-33 (§167.005(1), F. S.), or *otherwise provided* (Art. VIII, State Const.) by law, either general law or special act such as the charter in question. But Ch. 69-242, Laws of Florida (§166.17, F. S.), is clearly intended to provide a procedure for amendments to "any part or to all" of a charter, and therefore constitutes express legislative authority to change or delete by ordinance any provision in those special acts (city charters), pursuant to Art. VIII, §2 of the State Const. Chapter 69-242, Laws of Florida (§166.17, F. S.), contains no limitation such as that found in §166.01, F. S., enacted prior to the constitutional amendment in question and stating that provisions in Ch. 166, F. S., for amendment of municipal charters by ordinance "shall not . . . authorize any city . . . to enlarge its corporate powers beyond the limitations prescribed by law . . ."

Article VII, §9(a) of the State Const. does require that "municipalities shall . . . be authorized by *law* to levy ad valorem taxes . . ." (Emphasis supplied.) The statutes above analyzed must of course be regarded as presumptively within this mandate that such levy shall be authorized by legislative act, although in practical consequence Ch. 69-242, Laws of Florida (§166.17, F. S.), would permit authorization by ordinance passed pursuant to law, or indirectly, rather than by direct authorization by law. The 1969 Acts are clearly designed to implement the provisions of Art. VIII, State Const., which states no exclusions from its broad reference to governmental powers which municipalities may exercise "except as otherwise provided by law." In addition, the mandatory terms of Art. VII, §9(a), State Const., apparently do not contemplate a legislative prohibition against ad valorem tax levies by a municipality. Cf. §167.43, F. S., authorizing levy of property taxes by municipalities generally.

My affirmative conclusion with respect to your question makes unnecessary the consideration of subsidiary issues raised, which issues are contingent on the impropriety of charter amendment by ordinance in this situation.

069-128—December 11, 1969

#### PUBLIC OFFICERS—AGENCY HEADS

#### REIMBURSEMENT OF PER DIEM AND SUBSISTENCE EXPENSES INCURRED BY HEADS OF DIVISIONS

To: James A. Bax, Secretary, Department of Health and Rehabilitative Services, Tallahassee

## QUESTION:

Is a division director of a state department an "agency head" within the contemplation of § 112.061(6), F. S., for the purpose of reimbursement of per diem and subsistence expenses incurred while traveling on official business?

Section 112.061(6), F. S., provides for per diem and subsistence allowance *inter alia*, to "public officers and agency heads." As used in § 112.061(2)(b), F. S., the definition of "agency head or head of the agency" is: "The highest policy[-]making authority of a public agency, as herein defined."

Section 112.061(2)(a), F. S., defines "agency or public agency" as follows:

Any officer, department, agency, division, subdivision, political subdivision, board, bureau, commission, authority, district, public body, body politic, county, city, town, village, municipality or any other separate unit of government created pursuant to law.

A public agency, therefore, by definition as above-noted, may be any "officer" or "department" and the highest policy-making authority as therein defined does not contemplate a subagency or subunit of an agency to be the "highest policy[-]making authority." The intent of this legislation is as outlined in § 112.061(1), F. S.

Under governmental reorganization, while your question does not specifically so mention, the department of health and rehabilitative services is created by § 19, Ch. 69-106, Laws of Florida (§ 20.19, F. S.).

The department of health and rehabilitative services, by § 112.061, F. S., would be an "agency," and the secretary of the department of health and rehabilitative services, the "head" of the department of health and rehabilitative services by § 19(1), Ch. 69-106, Laws of Florida (§ 20.19(1), F. S.), would be an agency head or head of the agency as defined in § 112.061(2)(b), F. S.

It is important to distinguish heads of divisions and bureaus from the head of the department of health and rehabilitative Services, as directors of divisions and chiefs of bureaus, § 4(3)(a),(b), Ch. 69-106, Laws of Florida (§ 20.04(3)(a),(b), F. S.), are not the highest policy-making authority of the public agency.

The secretary, § 3(5), Ch. 69-106; Laws of Florida (§ 20.03(5), F. S.), is head of the department of health and rehabilitative services, § 3(4), Ch. 69-106, Laws of Florida (§ 20.03(4), F. S.), which position includes powers and duties not limited to the specifics provided in § 5, Ch. 69-106, Laws of Florida (§ 20.05, F. S.).

The aforementioned sections read *in pari materia* with § 112.061, F. S., provide authority to place the secretary of the department of health and rehabilitative services in the category of the highest policy-making authority of that department.

"Division Directors" of divisions of the board of commissioners of state institutions transferred into the department of health and rehabilitative services, as well as other division directors, were employees prior to reorganization, and Ch. 69-106, Laws of Florida (Ch. 20, F. S.), does not by statutory pronouncement change that status. They did not occupy an office by election of the people or were they duly commissioned officers through executive fiat. These directors therefore would not be agency heads prior to reorganization, nor subsequent thereto, for the purpose of reimbursement of per diem and subsistence expenses incurred while traveling on official business.

069-129—December 15, 1969

## PUBLIC OFFICERS

TRAVEL EXPENSES AND PER DIEM OF ADVISORY  
COUNCILS TO THE DIVISION OF MENTAL  
HEALTH

To: *James A. Bax, Secretary, Department of Health and Rehabilitative Services, Tallahassee*

## QUESTIONS:

1. Are the advisory councils to the division of mental health authorized under §§ 402.01, 965.04[§ 402.15] and 965.041[§ 402.11], F. S., legally constituted advisory bodies after reorganization of state agencies under Ch. 69-106, Laws of Florida?

2. If it is found that these advisory councils are legally transferred to the department of health and rehabilitative services, shall reimbursement for travel expenses be made under authority of § 112.061(6)(c), F. S., as "public officers" with a maximum of \$20.00 per diem or should they be reimbursed under § 112.061(6)(d), F. S., as "other travelers" with a maximum of \$17.00 per diem?

In general, advisory council boards and commissions have no common law powers but are limited to such powers as may be granted, either expressly or by necessary or fair implication by the statutes creating them. 42 Am. Jur., Public Administrative Law, § 26; Florida Industrial Commission vs. National Trucking Company, 107 So.2d 397 (DCA 1 1958). The enabling statute which creates the councils, incorporates the authority, power, and jurisdiction which may be only exercised in accordance therewith in the mode prescribed by statutes. Board of County Commissioners of Dade County v. State *ex rel.* Frazier, 111 So.2d 476; Keating v. State *ex rel.* Ausbel, 167 So.2d 46 (DCA 1 1964).

The duties and functions of the councils under §§ 402.01, 965.04[§ 402.15], and 965.041[§ 402.11], F. S., are advisory. Section 965.041[§ 402.11], F. S., establishes the Florida advisory council on mental health in lieu of the advisory council for the division of mental health under the provisions of § 965.04[§ 402.15], F. S. Section 402.01, F. S., created a council on mental health to advise and consult with the state board of health.

The 1969 Florida legislature in Ch. 69-56, Laws of Florida, amended § 402.01, F. S., to change the designation of the council from council on mental health to council on training and research in mental health to advise and consult with the division of mental health (§ 965.01(3)[§ 402.10(3)], F. S.).

Section 965.01(3)[§ 402.10(3)], F. S., has no reference either directly or by implication to the council on training and research in mental health originally created under Ch. 402, F. S., or to the Florida Advisory Council on Mental Health founded under § 965.041[§ 402.11], F. S.

The council on mental health under Ch. 402, F. S., not the Florida advisory council on mental health, under § 965.041[§ 402.11], F. S., is funded by § 1, Items 145, 146, 147, 148 and 149 of Ch. 69-100, Laws of Florida (the Appropriations Act), for personal services, expenses, operating capital outlay, and research grants and aids and scholarships.

Section 19 of Ch. 69-106, Laws of Florida (§ 20.19, F. S.), restructuring the executive branch of government, does not identify the



aforementioned councils as being merged in or transferred to the department of health and rehabilitative services. Section eight, Ch. 69-106, Laws of Florida, provides that the powers, duties, and functions of the governor and the office of the governor, as prescribed by law, are continued.

Members of the council on training and research in mental health, under Ch. 402, F. S., are appointed by the governor for a term of office under fixed, but staggered, terms, with expenses specifically provided by § 402.02, F. S. Members of the Florida Advisory Council on Mental Health, founded under § 965.041[§ 402.11], F. S., are also appointed by the governor for fixed terms which are referred to in the statute as "terms of office." The director of the division of mental health is an ex officio member of the Florida Advisory Council on Mental Health, which council may make rules for the conduct of its affairs and meet at least quarterly and at other times upon the call of the chairman.

These councils continue until the statutes creating them are amended or repealed, and both the council on training and research in mental health and the Florida Advisory Council on Mental Health are legally constituted bodies on a current basis.

The statutes creating these councils seem to contemplate directly rather than by implication the appointees are officers, in view of the functions requiring independent judgment, discretion and authority rather than requiring public ministerial duties. See, AGO 068-44, Mar. 29, 1968, Biennial Report of the Attorney General, 1957-1958, p. 234. The reimbursement of per diem and mileage to members of the Florida Advisory Council on Mental Health is provided by moneys appropriated to the division of mental health under the department of health and rehabilitative services, whereas members of the council on training and research in mental health are reimbursed from moneys directly appropriated by the legislature to that council. Both councils are reimbursed for travel expenses under the provisions of § 112.061, F. S.

#### AS TO QUESTION 1:

Since the Florida Advisory Council on Mental Health, created under § 965.041[§ 402.11], F. S., is in lieu of the advisory council for the division of mental health under the provisions of § 965.04[§ 402.15], F. S., § 965.04[§ 402.15], F. S., is not considered in this opinion. Section 965.041[§ 402.11], F. S., created a Florida Advisory Council on Mental Health and § 402.01, F. S., as amended, created the council on training and research in mental health in Florida, and those statutes have not been repealed and were not directly dealt with in Ch. 69-106, Laws of Florida. Therefore, the Florida Advisory Council on Mental Health and the council on training and research in mental health are both legally constituted advisory bodies.

#### AS TO QUESTION 2:

Your second question anticipates a legal transfer to the department of health and rehabilitative services of the above advisory councils, but Ch. 69-106, Laws of Florida, did not transfer these advisory councils to the department of health and rehabilitative services, and your question therefore, is answered accordingly with reference to the aforementioned answer to Question 1.

069-130—December 17, 1969

## FIRE CONTROL DISTRICTS

LEVY OF MUNICIPAL CIGARETTE TAX UNDER CH. 210, F. S.,  
BY DISTRICT ORDINANCE NOT AUTHORIZED

To: A. R. Brautigam, Director, Division of Beverage, Tallahassee

## QUESTIONS:

1. Is Ordinance No. 69-1 adopted on May 13, 1969 by the Ocean City-Wright fire control district valid?

2. If said ordinance is valid, is the subject fire control district entitled to be treated as a municipality within Ch. 210, F. S., for the purpose of participating in the distribution of the cigarette tax collected by the division of beverage?

The subject ordinance imposes a tax on the purchase and use of cigarettes within the district "except within the City of Shalimar," and provides that such tax shall be collected by the division of beverage and used by the district under the terms of § 210.03, F. S.

Section 210.03, F. S., provides in part:

Any municipality in this state may...impose an excise or privilege tax upon the sale...and use of cigarettes...within the territorial limits of such municipality up to the same amount...as set forth in § 210.02.... Any funds received...shall be used and expended for the following purposes only...: Streets, bridges, storm sewers, curbs, drains, gutters, water supplies, sanitary facilities and services for the preservation, protection or improvement of the public health and safety, including hospitals, fire stations and fire fighting equipment, sanitary sewers, sewerage disposal systems, sewerage disposal plants and facilities, garbage and refuse collection and disposal services, facilities and equipment, incinerators and other facilities and services, including street cleaning, inspections and services for the protection of public health including the enforcement of ordinances designed to maintain safe health standards with respect to foods, mosquito, insect and rodent eradication and control, and the removal and abatement of nuisances which may be or constitute dangers to public health and the exercise of controls for public safety, facilities for the prevention of beach erosion, the enforcement of the laws of the state, and municipal ordinances with respect to public travel, health and safety, and such other state functions which are performed by municipal governments within their boundaries, and are otherwise performed by the state and county governments outside of the limits of incorporated municipalities.

The Ocean City-Wright fire control district was created and operates under Ch. 63-1685, Laws of Florida, as amended by Chs. 65-1988, 67-1789, and 67-1800, Laws of Florida, providing that certain described lands in Okaloosa County

...shall be incorporated as a special fire control district, which shall be a public municipal corporation for the public benefit, with perpetual existence, to be known as the Ocean City-Wright fire control district in which name it may sue and be sued, lease, own, possess and convey real and personal property, by purchase or gift or otherwise, in order to carry out the purposes of this act. (Emphasis supplied.)

It is clear from a consideration of these special acts that the district is an entity created for definitely restricted purposes and not for general community government. The single reference to its status as a public municipal corporation is coupled with an enumeration of specified acts which the district may perform only in order to carry out the "purposes of this act." Those purposes, in my opinion, relate primarily to fire protection and do not encompass the ordinary functions of a municipal corporation. The initial designation of the district as a "public municipal corporation" is, under these circumstances, insufficient to entitle the district to exercise taxing powers conferred by general law, Ch. 210, F. S., on municipal corporations in Florida.

This conclusion is sustained by general authorities evaluating such districts, based on numerous court decisions:

Customarily, fire protection districts are not treated as municipal corporations . . . . Such districts possess the powers expressly granted to them by statute . . . . In most states grants of power to fire districts will be interpreted narrowly and strictly. Antieau: Local Government Law, Vol. 3A, Ch. XXX(D.). Also McQuillin, Municipal Corporations, Rev. Ed., Vol. 1, p. 403.

In addition to the omission of general municipal government functions and powers, the district charter, §§ 9 and 10, Ch. 65-1988, Laws of Florida, provide for funding of its operations only by special assessments and certain authorized indebtedness. A reasonable construction of these provisions excludes alternative methods of revenue production such as that attempted by the ordinance in question. Obvious distinctions exist in the case of specific provisions authorizing exercise of municipal powers under general laws: State *ex rel.* Dade County v. Brautigam, Fla. 1969, 224 So.2d 688. The Florida cases also support the strict construction of special acts controlling activities of local government entities: State v. Borman, Fla. 1939, 189 So. 669; City of Clearwater v. Caldwell, Fla. 1954, 75 So.2d 765; Higsen v. Rileigh, Fla. App. 1959, 115 So.2d 715.

Ordinance No. 69-1 adopted by the district is invalid as an attempt to exercise a power beyond that permitted by its charter. The district is not entitled to the benefits of Ch. 210, F. S.

069-131—December 17, 1969

#### JUSTICES OF THE PEACE

#### AUTHORIZED FEES—BONDS, DISPOSITION—INCARCERATION OF PERSONS ARRESTED BY CONSTABLE PRIOR TO BAIL OR PRELIMINARY HEARING

To: T. Richard Hagin, County Attorney, Bushnell

#### QUESTIONS:

1. When performing similar services is a justice of the peace entitled to the same fees as are provided for the clerk of the circuit court in § 28.24, F. S.?
2. Should cash and paper bonds approved by said justice of the peace be transferred to the clerk of the circuit court or the sheriff?
3. May persons arrested by a constable be lodged in the county jail prior to preliminary hearing before the justice of the peace?

The 1967 Revision of F. S. repealed § 81.26(2), F. S., which provided:

The fees of a justice of the peace shall be the same as those of the clerk of the circuit court for similar services. (§ 49, Ch. 67-254, Laws of Florida.) The fees of the clerk of the circuit court referred to appear in § 28.24, F. S.

While operative, § 81.26(2), F. S., was held limited in application to fees designated for specific acts performed by the clerks of the circuit courts, as distinguished from authorizing a justice of the peace to collect the filing fees of said clerk in connection with civil and criminal cases as appears in § 28.241, F. S. Attorney General Opinion 053-166, July 20, 1953, Biennial Report of the Attorney General, 1953-1954, p. 36. See also AGO, 055-273, Oct. 17, 1955, Biennial Report of the Attorney General, 1955-1956, p. 355.

Material to your inquiry are the provisions of § 37.08, F. S., which provides:

All the provisions of law which can be applied to courts of justices of the peace, or to any proceeding therein, or to any officer thereof, shall be applicable thereto in all cases except when they are expressly or impliedly restricted to courts other than justice of the peace courts, and except when they are inconsistent with the provisions of this chapter. (Emphasis supplied.)

Section 1598, Revised Statutes, 1892, contained substantially the above language except for the phrase, "all the provisions of Title I, Second Division, of this revision," which limited the application of § 1598, RS, to provisions applicable to practice before courts generally as compiled in said Title I, Second Division, RS 1892.

Florida Compiled Laws of 1914 reflect a legislative change in the language of § 1598, RS, 1892, to include the phrase, "all the provisions of law," in lieu of the prior limitation to Title I, Second Division, RS, 1892. The same language now appears in § 37.08, F. S., 1967, and has not been the subject of an Attorney General's opinion or judicial examination.

Section 1630, Revised Statutes, 1892, a part of the Revised Statutes relating to proceedings at an after trial, provided for the fees of the justice of the peace to be "the same as those of the Clerk of the Circuit Court for similar services," and was carried forward to become a part of Ch. 81, F. S., subsequent to the separation of procedural matters in the justice of the peace court, as appears in Ch. 81, from the provisions of substantive law relating to justice of the peace courts, appearing in Ch. 37, F. S.

A similar example of conflicting provisions appearing in the Revised Statutes was considered by the Fla. Sup. Ct. in *Hillsborough County Commissioners v. Jackson*, 50 So. 423, 58 Fla. 210, 138 Am. St. Rep. 110, 19 Ann. Cas. 148.

...if repugnant provisions of prior statutes are compiled and adopted in the General Statutes, it must be presumed that the repugnancy was overlooked, and that it was the intention of the compilers and of the Legislature to bring forward the latest expression of the legislative will without reference to whether the latest statute appears first or last in the General Statutes.

Of equal importance is the presumption that statutes expressly repealing specified acts are not intended to repeal other acts. *American Bakeries Co. v. Haines City*, 180 So. 524, 131 Fla. 790.



It is fundamental that courts should give appropriate effect to amendment of statutes unless a contrary intent appears on the surface. *Atlantic Coast Line R. Co. v. Amos*, 115 So. 315, 94 Fla. 588.

Any uncertainty as to legislative intent in amending a statute should be resolved by an interpretation that best accords with public benefits. Also, the legislature is presumed to know existing law when a statute is enacted. *Collins Inv. Co. v. Metropolitan Dade County*, 164 So.2d 806; and it should never be presumed that the legislature intended to enact purposeless, and therefore useless, legislation. *Warnock v. Florida Hotel and Restaurant Com'n.* 178 So.2d. 917.

Applying the above recognized rules of statutory construction, Question 1 may be answered as follows:

Presumably the legislature, with knowledge of the provisions of § 37.08, F. S., determined § 81.26(2), F. S., was no longer necessary as authority for justice of the peace fees the same as those of the clerk of the circuit court for similar services and, in its wisdom, repealed said § 81.26(2), F. S. The amendment to the substantive provisions of what now appears as § 37.08, F. S., permitting the application of all available law to the operation of the justice of the peace court and the officers thereof, provides authority for the continued collection of fees of the clerk of the circuit court, as provided by § 28.24, F. S., when similar services are performed by justices of the peace.

The broad provisions of § 37.08, F. S., appear to have been recognized by the legislature in the enactment of Ch. 69-346, Laws of Florida, an act amendatory of Ch. 145, F. S., relating to compensation of county officials and providing that:

... Laws relating to the compensation of constables and justices of the peace are also *not repealed*, and those officials shall be subject to the provisions of existing laws and § 145.14. (Emphasis supplied.) Section 145.131, F. S., § 9, Ch. 69-346, Laws of Florida.

In the absence of controlling special, local or general law of limited application to the contrary, Question 1 is answered in the affirmative.

#### AS TO QUESTION 2:

The repository of cash or paper bonds approved by the justice of the peace is determined by the undertaking in the bond. Bonds approved for preliminary appearance before the justice of the peace as a committing magistrate should be retained by said justice of the peace. However, bonds approved by the justice of the peace for appearance at trial should be transmitted to the clerk of the court having trial jurisdiction. Sections 903.12 and 903.26, F. S. Thus the cash or surety bond is available to the court having jurisdiction to forfeit said bond on failure of the defendant to appear. Question 2 is answered accordingly.

#### AS TO QUESTION 3:

The authority for the commitment of prisoners for safekeeping by the county judge or justice of the peace or for retaining such persons in custody of the sheriff or constable appears in § 937.04, F. S. Thus, the facilities of the county jail could be used to house persons arrested by the constable prior to admission to bail or preliminary hearing.

No consideration has been given to the reasonableness of a period of confinement prior to a preliminary hearing before the justice of the peace as committing magistrate, since such question can be resolved only by a court of competent jurisdiction, after considering all facts and circumstances of a particular case.

069-132—December 23, 1969

TAXATION  
AD VALOREM—EXEMPTION FOR DISABLED  
PERSONS

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

QUESTION:

To what extent is the property of disabled persons exempt from taxation under § 192.11[§ 196.24], F. S., as revised by Ch. 69-216, Laws of Florida; §§ 192.111, 192.112 and 192.113[§ § 196.081, 196.091 and 196.101], F. S.?

Article VII, § 3(b), State Const., provides a mandatory exemption for every person who is totally and permanently disabled, in the following language:

*There shall be exempt from taxation . . . to every . . . person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five hundred dollars. (Emphasis supplied.)*

Provision is made, also in Art VII, § 3(a), for permitting but not requiring exemption, by general law, of "such portions of property as are used predominantly for . . . charitable . . ." and other specified purposes.

The statutes in question constitute legislative implementation of these constitutional provisions, under the terms of Art. XII, § 6 of State Const., which preserves "All laws in effect upon the adoption of this revision, to the extent not inconsistent with it." (Emphasis supplied.) The specific exemptions detailed in §§ 192.111, 192.112, and 192.113[§ § 196.081-196.101], F. S., for real estate used as homesteads by amputees and those with wheelchair disabilities, appear to be within the range of legislative definition necessarily contemplated by Art. VII, § 3(b), State Const., requiring exemption of property by general law in favor of the "totally and permanently disabled."

Section 192.11[§ 196.24], F. S., is amended by § 16 of Ch. 69-216, Laws of Florida, to read:

**196.24 Evidence of disability of ex-servicemen; exemption.**—Any ex-serviceman . . . who has been disabled to a degree of ten percent or more in war service . . . or by misfortune, shall be entitled to the exemption from taxation . . . (Emphasis supplied.)

Because this provision relates only to "evidence" or definition of what disability shall entitle veterans to the benefit of exemption provisions, it must in my opinion be construed in conjunction with and subject to limitations contained in § 192.06(7)[§ 196.191(7)], F. S., which states a clear and unequivocal exemption from taxation for "Property to the value of five hundred dollars to . . . every person who . . . has . . . been disabled in war . . ." (Emphasis supplied.) The conclusion that Ch. 69-216, Laws of Florida, does not delineate a new total exemption of all property of 10% disabled veterans is further supported by the fact that this chapter is a reviser's act. Chapter 69-216, Laws of Florida, omits the words "shall be entitled to the exemption provided for in § 9, Art. IX, of the Constitution [of 1885]," which formerly limited the exemption to five hundred dollars. The notes

accompanying its amendment of § 192.11[§ 196.24], F. S., indicate an intent merely to conform the law to new constitutional provisions of Art. VII, § 3(b), State Const., of the 1968 revision. Since, under the settled law in Florida, reviser's acts must be construed to exclude substantive changes, I conclude that the act is not intended to remove the existing limitation on the amount of this exemption in question. *Jones v. Christina*, Fla. 1966, 184 So.2d 181; *Foley v. State*, Fla. 1951, 50 So.2d 179.

Chapter 69-216, Laws of Florida, must in my opinion be regarded as an effective exercise of legislative authority under Art. VII, § 3, State Const., which, as above indicated, prescribes or requires certain exemptions and permits others. The mandatory provision of § 3(b) of said article requiring a minimum exemption for totally and permanently disabled persons has not yet been judicially construed and does not in explicit terms preclude permissive statutory exemption in favor of veterans disabled to a lesser degree. In addition to the necessary presumptions in favor of such a provision reenacted subsequent to the effective date of the revised constitution, the decisions require a liberal view of legislative exemptions for purposes related to problems of "governmental concern." *Jasper v. Mease Manor, Inc.*, Fla. 1968, 208 So.2d 821. See also *Porter v. Baynard*, Fla. 1946, 28 So.2d 890; *Daytona Beach R. & R. v. Paul*, Fla. 1965, 179 So.2d 349.

The cited laws constitute expressions of the legislative will to exempt those who qualify under the statutory terms. I find accordingly, for the reasons above stated, that the extent of exemption under §§ 192.11, 192.111, 192.112 and 192.113 (renumbered by Ch. 69-55, Laws of Florida, as §§ 196.24, 196.081, 196.091, and 196.101, F. S.), is not altered by Ch. 69-216, Laws of Florida, or by Art. VII, § 3(b) of the State Const.

069-133—December 23, 1969

#### TAXATION

##### EXEMPTION—TOTALLY DISABLED PERSONS—DISABILITY NONSERVICE CONNECTED—ART. VII, § 3(b), STATE CONST.; § 192.06(7)[§ 196.191(7)], F. S., 1967

To: *D. Ray Harrison, Jr., Tax Assessor, Trenton*

#### QUESTION:

Is a totally disabled person entitled to \$500.00 exemption that is nonservice connected?

Under the provisions of Art. VII, § 3(b) and Art. XII, § 6 of the State Const., I believe the question is answered in the affirmative by § 192.06(7)[§ 196.191(7)], F. S.:

(7) Property to the value of five hundred dollars to every . . . person who is a bona fide resident of the state and has . . . been disabled . . . by misfortune.

069-134—December 23, 1969

#### CRIMINAL PROCEDURE

##### PEACE OFFICERS—CONSTRUCTION OF § 90.141, F. S., PROVIDING FOR PER DIEM, WITNESS FEE, ETC., FOR OFFICERS ATTENDING HEARINGS— "HEARING" DEFINED

To: *Robert B. McGregor, Judge, Magistrate's Court, Titusville*

## QUESTION:

When a peace officer, at a time other than during his regular shift, appears before a magistrate and makes a sworn complaint against a person arrested by such officer, is such appearance an appearance at a "hearing" within the contemplation of § 90.141, F. S.?

Said § 90.141, F. S., provides:

90.141 Law enforcement officers; per diem, expenses; witnesses, pay.—Any law enforcement officer of any municipality, county or the state who shall appear as an official witness to testify at any *hearing* or law action in any court of this state as a direct result of his employment as a law enforcement officer shall be entitled to per diem and traveling expenses at the same rate provided for state employees under § 112.061. In addition thereto, such officer shall be entitled to receive the daily witness pay, exclusive of the mileage allowance, as provided by § 90.14, except when such officer is appearing as a witness during time compensated as a part of his normal duties. (Emphasis supplied.)

The word "hearing" is defined in Black's law dictionary, 4th Ed., as follows:

HEARING. *Proceeding* of relative formality, generally public, with definite issues of fact or of law to be tried, in which parties proceeded against have right to be heard, and is much the same as a trial and may terminate in final order. In re Securities and Exchange Commission, D.C.N.Y., 14 F.Supp. 417, 419. Synonymous with trial, and includes reception of evidence and arguments thereon. Grant v. Michaels, 94 Mont. 452, 23 P.2d 266. *It is frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceedings subsequent to its inception, and may include proceedings before an auditor.* Menard v. Bowman Dairy Co., 296 Ill.App. 323, 15 N.E.2d 1014, 1015. (Emphasis supplied.)

When an officer goes before a magistrate to make a complaint against a person arrested by him, the person proceeded against (the arrested person) has no right to be heard. Such a proceeding is not at all the same as a trial, where both sides have the right to produce evidence and arguments; it is strictly *ex parte*. What happens before the magistrate is not subsequent to the inception of a proceeding before him; it is itself the inception. Your question is answered in the negative.

069-135—December 23, 1969

STATE CHARTERED SAVINGS ASSOCIATIONS OR  
SAVINGS AND LOAN ASSOCIATIONS

ADOPTION OF BYLAW PROVISIONS AND SECURITY FORMS  
APPROVED BY ORDINANCE NO. 22,506, ADOPTED BY  
THE FEDERAL HOME LOAN BANK BOARD

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

QUESTIONS:

1. Is the issuance of the security forms approved by



Ordinance No. 22,506 adopted by the Federal home loan bank board legal under Florida laws which permit state-chartered savings or savings and loan associations to raise capital in the form of savings deposits?

2. Would such savings deposits and any other savings account in the institution, in the event of voluntary or involuntary liquidation, dissolution, or winding up of the institution, or in the event of any other situation in which the priority of such savings deposits or savings account is in controversy, have, to the extent of their withdrawal value, the same priority as general creditors of the institution not having priority (other than any priority arising or resulting from consensual subordination) over other general creditors of the institution?

3. In the event surplus assets remain after satisfying all other claims in the liquidation of a mutual institution, will the savings deposits and savings accounts share in those surplus assets on a pro rata basis?

4. Would the terms "savings deposits" and "savings accounts" under Florida's laws come within the definition of "an insured account" as defined in the rules and regulations for insurance of accounts of the Federal Savings and Loan Insurance Corporation?

I conclude that all questions are answered in the affirmative, based on a consideration of Ch. 69-39, Laws of Florida (§ 665.221, F. S.), together with the documents in question. This conclusion assumes the legality of security forms used previously, which are not submitted for review, and the absence of any change other than those specified in the resolution.

Questions 2 and 3 appear to be covered by the express provisions of § 22 of Ch. 69-39, Laws of Florida (§ 665.221, F. S.). I find no provision of law with reference to savings deposits and accounts in conflict with the definition of "insured account" in the rules and regulations for insurance of accounts of the Federal Savings and Loan Insurance Corporation:

**7.561.3 Insured Account[.]** An "insured account" is a withdrawable or repurchasable share, investment certificate, deposit, or savings account held by an insured member in an institution insured by the Corporation. Accounts which by the terms of the contract of the holder with the institution or by provisions of state law cannot be withdrawn or the value thereof paid to the holder until all of the liabilities, including other classes of share liabilities, of the institution have been fully liquidated and paid upon the winding up of the institution are not insurable, and are hereinafter referred to as "nonwithdrawable accounts."

Your questions are answered accordingly in the affirmative.

069-137—December 23, 1969

#### COUNTY OFFICERS

#### BUDGET OFFICERS—FEE OFFICERS—CONSTRUCTION OF CH. 145, F. S., AS AMENDED BY CH. 69-346, LAWS OF FLORIDA

To: Ernest Ellison, Auditor General, Tallahassee

#### QUESTIONS:

1. Chapter 69-346, Laws of Florida, and your opinion

provide that a county budget officer's salary is increased effective July 1, 1969, where such increase is provided by the law. When is the second increase effective and on which twelve months period is it calculated?

2. May a county fee officer for which you have ruled that Ch. 69-346, Laws of Florida, is effective Jan. 1, 1969, continue to retain as personal income certain fees, commissions, or other extra compensation, heretofore retained by him personally, through June 30, 1969?

3. If your answer to Question 2 is affirmative, then on what basis should such county fee officer's compensation be calculated for the year 1969 and for the year 1970?

#### AS TO QUESTION 1:

In AGO 069-136, modifying AGO 069-68 of this publication, it is provided that:

Additional increased compensation for officers on a budget takes effect Oct. 1, 1969, and is 120% of the total compensation received during the fiscal year Oct. 1, 1968, to Sept. 30, 1969, and there will be increases annually thereafter in the same fashion until the salary authorized in Ch. 145, F. S., as amended, is reached. See § 145.121(2)(b), F. S.

For example, the salary for 1968-69 would be calculated as follows:

##### (A)

For the period Oct. 1, 1968, to June 30, 1969, the officer would receive 9/12ths of the compensation authorized by Ch. 145, F. S. (1967), or applicable local, special or general law of limited application, plus the actual ex officio personal income *earned* from fees and commissions during the period Oct. 1, 1968 to June 30, 1969.

##### (B)

From July 1, 1969 (the effective date of Ch. 69-346[Laws of Florida]) to September 30, 1969, the officer would receive 3/12ths of 120% of the total compensation to which the officer was entitled for the fiscal year ending September 30, 1968, including ex officio or contract personal income from fees and commissions.

The increased salary for a budget officer for the period Oct. 1, 1969, to Sept. 30, 1970, would be calculated as follows:

One hundred twenty per cent (120%) of the total compensation received during fiscal year ending Sept. 30, 1969.

In no event, however, is a fee or budget officer authorized to receive more than that allowed under Ch. 145, F. S., as amended by Ch. 69-346, Laws of Florida, and percentage increases stop when the maximum allowable compensation figure is reached unless the population of the county increases so as to place the officer in a higher salary bracket effective July 1, 1971, pursuant to § 11.031(3), F. S.

Thus, the increased salary authorized eligible budget officers as of Oct. 1, 1969, would be computed on the total compensation received by such officer during the period Oct. 1, 1968-Sept. 30, 1969, and would be computed at 120% of the total compensation received by said officer for that fiscal year. Question 1 is answered accordingly.

## AS TO QUESTION 2:

Section 7, Ch. 69-346, Laws of Florida (§ 145.121(1), F. S.), states:

**145.121 Other income to be income of the office; implementation of salary schedules.—**

(1) Except for the salary receivable under this chapter, all fees, costs, salaries, commissions, extra compensation or any other funds which are paid or payable to a county official or to his office:

(a) By law, or

(b) On account of any service (including service arising out of ex officio duties) performed by the official for any agency or instrumentality of the state or of any county or municipality in the state, or for any officer, board, district, authority or unit of state or local government, or for individuals, wherein any of the personnel or equipment or space of the office is employed shall be included as income of the office and shall not be retained by the county official as personal income.

The prohibition against county officers receiving ex officio compensation except the salary authorized under Ch. 145, F. S., as amended, became operative July 1, 1969, the effective date of Ch. 69-346, Laws of Florida, amending Ch. 145, F. S. Thus, fees, commissions, or other compensation which were heretofore retained as ex officio, personal or contract income of the officer may be retained by said officer during the period Jan. 1, 1969, through June 30, 1969. All such fees, commissions, or other income received by such officer subsequent to July 1, 1969, are considered income of the office, to be paid into the county general fund, as provided by § 145.12, F. S., as amended.

Question 2 is answered in the affirmative.

## AS TO QUESTION 3:

The compensation for the year 1969 for county fee officers would be based upon 120% of the total 1968 compensation of such officer plus ex officio or contract personal income from fees and commissions earned by said officer during the period Jan. 1, 1969-June 30, 1969. Compensation of such officers for the period Jan. 1, 1970-Dec. 31, 1970, would be calculated as follows: One hundred twenty per cent (120%) of the total compensation received during the year ending Dec. 31, 1969. Question 3 is answered accordingly.

In no event, however, is a fee or budget officer authorized to receive under Ch. 145, F. S., more than that allowed under said chapter as amended by Ch. 69-346, Laws of Florida, and percentage increases stop when the maximum allowable compensation figure is reached unless the population of the county increases so as to place the officer in a higher salary bracket effective July 1, 1971, pursuant to § 11.031(3), F. S. See AGO's 069-68 and 069-136, of this publication.

069-138—December 24, 1969

## STATE ATTORNEYS AND PUBLIC DEFENDERS

## BAR DUES—NOT PAYABLE FROM PUBLIC FUNDS

To: J. H. Guerry, Executive Director, Judicial Administrative Commission, Tallahassee

## QUESTIONS:

1. In view of the authorization of Ch. 69-100, Laws of Florida, the 1969 Appropriations Act, for state attorneys and public defenders to elect full-time service and receive increased compensation, may their dues to either The Florida Bar or to local bar associations be paid from state funds?

2. If the answer to Question 1 is in the affirmative, then may The Florida Bar or local bar associations dues of justices of the supreme court, judges of district courts of appeal and circuit judges be paid from state funds?

## AS TO QUESTION 1:

In AGO 058-15, rendered by one of my predecessors in office, Honorable Richard W. Ervin, under date of Jan. 14, 1958, Biennial Report of the Attorney General, 1957-1958, p. 497, he said: "It is my opinion that local bar association and The Florida Bar dues are private expenses, personal to the individual belonging to these organizations . . . ." In that opinion, Mr. Ervin held that even though a special or local law required a county judge or justice of the peace to be a member of The Florida Bar, his Florida Bar dues could not be charged to the expense of his office.

I think that any public interest served by a state attorney or public defender being a member of The Florida Bar or a local bar association is too remote and incidental to admit of a holding that his payment of dues is for a public purpose. The fact that a state attorney or public defender may have elected full-time service at increased compensation does not make his payment of dues a disbursement for a public purpose even though the public is incidentally benefited. Therefore, Question 1 is answered in the negative.

## AS TO QUESTION 2:

Although my answer to Question 1 appears to inexorably lead to a negative answer to Question 2, it is not necessary to answer Question 2 specifically because it requests an answer only if Question 1 is answered in the affirmative and I have answered it in the negative.

069-139—December 24, 1969

## TAXATION

SUBSURFACE RIGHTS—MINERAL RIGHTS RESERVED  
BY EVERGLADES DRAINAGE DISTRICT—IMMUNE  
FROM TAXATION

To: *G. E. Dail, Jr., Executive Director, Central and Southern Florida Flood Control District, West Palm Beach*

## QUESTION:

Will Ch. 69-60, Laws of Florida (amending § 193.481, F. S., and creating § 197.083, F. S.), operate in such a manner as to require or allow the tax assessor to place on the tax rolls the mineral rights reserved by Everglades drainage district in deeds to individuals?

The procedural aspects of Ch. 69-60, Laws of Florida, are discussed in AGO 069-110, of this publication, which concluded that subsurface rights owned by the state remain immune from taxation. With reference



to the specific issue presented above, I believe the law as amended, stating that subsurface rights when separated from the fee "shall be subject to separate taxation" (Emphasis supplied.), is not intended to remove existing exemptions or immunity or to impose a tax on any such property interest which would otherwise be exempt or immune. The provision appears to be simply that subsurface rights shall, when separated from the fee, be subject to separate assessment if they are otherwise taxable.

Assuming, therefore, that the district's mineral rights are not subjected to taxation by other controlling law, I conclude that Ch. 69-60, Laws of Florida (§ 193.221(1) [§ 193.481(1)], F. S.), does not operate to impose a tax on such property interests as are otherwise exempt, but operates only to require that these interests, when separately owned, shall be treated as a separate interest in the assessment of real property.

069-140—December 30, 1969

#### MUNICIPALITIES

##### INDUSTRIAL PLANT FINANCING—REVENUE BONDS— RESTRICTIONS; ART. VII, § 10, STATE CONST.

To: John W. Burton, Attorney, City of Wauchula, Wauchula

#### QUESTION:

May the city of Wauchula pledge its municipal credit to repay a \$200,000 short-term loan from private sources to enable the city to acquire land and improvements to be used by a manufacturing concern?

With reference to this problem, Art. VII, § 10, State Const. prohibits a municipality's use of its credit to aid any corporation or private entity, except under "laws authorizing... the issuance... of... revenue bonds to finance or refinance the cost of capital projects for industrial or manufacturing plants...."

Chapter 69-104, Laws of Florida (§§ 159.25-159.43, F. S.), appears to be the only law authorizing industrial plant financing pursuant to the specific provisions of Art. VII, § 10, State Const. I believe, therefore, that the terms imposed by that law and its constitutional authorization must be met before municipal credit may be pledged in aid of a private enterprise such as that described in your letter. This conclusion is in accord with that stated on a related problem in AGO 069-30, of this publication, with reference to the constitutional provision in question: "This definition and limitation of industrial bonds which may be authorized clearly precludes the existence of any broader or general power in that area...."

In addition, Art. VII, § 12 of the State Const. contains further restrictions on municipal indebtedness maturing more than 12 months after issuance, a circumstance apparently beyond the intentment of your present plans. Your question is answered in the negative.

069-141—December 30, 1969

#### RACING—DIVISION OF PARI-MUTUEL WAGERING

##### LICENSING OF RACETRACK EMPLOYEES—PARDONED FELON

To: A. R. Brautigam, Executive Director, Department of Business Regulation, Tallahassee

## QUESTION:

May an individual who has been convicted of a felony but who has subsequently received a full pardon be licensed by the division of pari-mutuel wagering under the existing statutes governing licensing of racetrack employees?

Attorney General's Opinion 069-66, Aug. 8, 1969, of this publication, rules, among other things, that a convicted felon is not eligible for a license as a racetrack employee, in accordance with § 550.181, F. S. The opinion explains that the then racing commission would have discretion to issue or not to issue an occupational license to an individual convicted of a felony who is not within the categories specifically prohibited by § 550.181(1). Your letter is not entirely clear as to whether the person to be licensed falls within one of the four categories listed in that opinion. If he does, then the division of pari-mutuel wagering is without discretion, in my opinion, even if a full pardon has been granted. The Fla. Sup. Ct. has ruled on several occasions that a full pardon does not exempt a person from revocation of his license even when revocation is based upon the activity for which he was pardoned. *Page v. Watson*, 192 So. 205; *State v. Snyder*, 187 So. 381. The opinion in the former case states as follows on p. 207:

(3) The modern trend of authorities generally accepted by the courts is that a pardon restores one to the customary civil rights which ordinarily belong to a citizen of the State, which are generally conceded or recognized to be the right to hold office, to vote, to serve on a jury, to be a witness, but it does not restore offices forfeited, nor property or interests vested in others in consequence of conviction. . . . While a pardon has generally been regarded as blotting out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense, it does not so operate for all purposes . . . .

\* \* \* \* \*

There is a wide distinction between the right which one, whether felon or free, has to hold his own property against the world, and deny even the state the right to take it from him without compensation therefor, and that other right to practice a profession which demands peculiar qualifications in order to protect the public, and requires a license. . . . One qualified in all respects has a right to a license, but one unqualified has no right whatever.

The law of the case before us supports all the more strongly the above conclusion since it is emphatic, as stated in AGO 069-66, mentioned above, that certain categories of persons are *not* to be licensed by the division if they have been convicted of a felony. Unlike the cases cited, the administrative board here has no discretion. The mandatory provisions of the above statute, plus the law as enunciated by the Sup. Ct. of Fla. that a full pardon does not restore a person's employment where licensing is involved, dictate a conclusion that your question must be answered in the negative. You will note that my August 11, 1969, letter, referred to by you, states that its conclusions as to the effect of a pardon are "for purposes of employment." No license was involved. See also AGO 054-20, Jan. 29, 1954, Biennial Report of the Attorney General, 1953-1954, p. 536, emphasizing the strict and mandatory nature of the language of § 550.181, F. S.

070-1—January 15, 1970

**CRIMINAL PROCEDURE**  
**PREPARATION OF COMPLAINTS OR AFFIDAVITS AS**  
**BASIS FOR ISSUANCE OF ARREST WARRANTS**  
**BY COUNTY JUDGE**

To: *Joseph P. D'Alessandro, State Attorney, Fort Myers*

**QUESTIONS:**

1. Is it the duty of the state attorney's office to prepare a written complaint or affidavit prior to the issuance of an arrest warrant by a county judge?

2. Is it the duty of the state attorney's office to approve a written complaint or affidavit prior to the issuance of an arrest warrant by a county judge?

Article V, § 6(6), State Const., provides that:

(6) STATE ATTORNEYS. In each judicial circuit a state attorney shall be elected by the qualified electors of that circuit in the same manner as other state and county officials, to serve a term of four years and to *fulfill duties prescribed by law.* (Emphasis supplied.)

I do not find any law which prescribes, or even intimates, that it is the duty of the state attorney to prepare or approve complaints or affidavits prior to the issuance of arrest warrants by a county judge.

Therefore, both of your questions are answered in the negative.

It has always been considered to be the responsibility of a county judge to prepare the complaints or affidavits upon the basis of which he issues arrest warrants. I understand that in some instances a county judge has procured a state attorney or assistant state attorney to prepare complaints or affidavits to be used as the predicate for the issuance of felony warrants. However, this has always been done as a matter of courtesy and not as the performance of a duty, at such times and places as the work load and convenience of the state attorney or assistant state attorney would permit.

070-2—January 15, 1970

**STANDARDS OF CONDUCT FOR STATE OFFICERS**  
**AND EMPLOYEES**  
**JURISDICTION OF COUNTY SOLICITOR IN THE ENFORCEMENT**  
**OF PART III, CH. 112, F. S.**

To: *Marvin U. Mounts, Jr., County Solicitor, West Palm Beach*

**QUESTIONS:**

1. Is the violation of Part III, Ch. 112, F. S., a crime?

2. If question 1 is answered in the negative, may the county solicitor seek injunctive relief to prevent a continuing violation of the law?

I find no language in Part III, Ch. 112, F. S., indicating that violation of this statute is a crime. No penalties or fines or imprisonment of any sort are connected with the prohibition of the law, and, as a matter of fact, even the words "it shall be unlawful" do not appear in the statute. See *Taulty v. Hobby, Fla., 71 So.2d 489*. The first question must therefore be answered in the negative.

As to question 2, relative to injunctive relief, I can find no statute giving the county solicitor authority for such proceedings as to Part III, Ch. 112, F. S. Without some general or specific constitutional or statutory authority to institute injunctive proceedings as to these violations the county solicitor would be unable to so act. The criminal court of record, for which you serve as prosecuting attorney, has jurisdiction over criminal cases only. Article V, § 9(2), State Const. See also § 32.16, F. S., designating the county solicitor as prosecuting attorney for the criminal court of record.

070-3—January 15, 1970

#### TAXATION—EXEMPTION

#### MUNICIPALLY-OWNED LAND LEASED TO NONPROFIT CORPORATION—CONSTRUCTION OF ART. VII, § 3(a), STATE CONST., § § 196.191 AND 196.25, F. S.

To: T. Terrell Sessums, State Representative, Tampa

#### QUESTION:

What is the impact of constitutional and statutory tax exemption provisions on the taxability of municipally-owned land leased to a nonprofit corporation?

Article VII, § 3(a), State Const. of 1968, provides that property owned by a municipality and used exclusively by it for municipal or public purposes shall be exempt from taxation. Authority for the exemption, by general law, of those portions of property used predominantly for educational, literary, scientific, religious or charitable purposes is also granted by this constitutional provision. Section 192.06[§ 196.191], F. S., provides for the exemption of such property.

Under the tax exemption provision of the 1885 State Const., it has been held that, insofar as municipally-owned land is concerned, it is not the ownership of the property that determines its exemption status: The test is whether the property is used for a municipal or other public purpose, rather than for a private purpose. See *Illinois Grain Corp. v. Schleman*, Fla.App.1962, 144 So.2d 329; and *Panama City v. Pledger*, Fla. 1939, 192 So. 470. The property loses its exempt status when it is leased for a predominantly private purpose. *Hillsborough County Aviation Authority v. Walden*, Fla. 1968, 210 So.2d 193. The fact that the corporate lessee of the municipally-owned property is a nonprofit organization does not automatically entitle it to a tax exemption. Here, again, it is not the corporate character that determines the exemption but the use of the property for which the exemption is claimed. See *University Club v. Lanier*, 119 Fla. 146, 161 So. 78; *State ex rel. Miller v. Doss*, Fla. 1941, 2 So.2d 303; AGO 060-158, Sept. 19, 1960, Biennial Report of the Attorney General, 1959-1960, p. 693; AGO 062-95, July 25, 1962, Biennial Report of the Attorney General, 1961-1962, p. 513.

The burden is on the taxpayer claiming the exemption to convince the tax assessor in the first instance—and the reviewing board and the courts, if review is sought—that the use of the property entitles him or it to an exemption under one or the other of the constitutional exemptions referred to above and the enabling act, § 196.191, F. S. This is primarily a question of fact. *Smith v. Housing Authority of Daytona Beach*, Fla. 1941, 3 So.2d 880; AGO 060-158, as noted above.

The question of what is a municipal or other public purpose has been said to be much broader in its scope than it was a generation ago.



See *Saunders v. City of Jacksonville*, Fla. 1946, 25 So.2d 648. In this case the court quoted with approval from *State v. McDavid*, 145 Fla. 605, 200 So. 100, as follows:

The time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental but that concept has been very much expanded and a municipal purpose may now comprehend all activities essential to the health, morals, protection and welfare of the municipality. *City of Fernandina v. State*, 143 Fla. 802, 197 So. 454. In *State v. City of Tallahassee*, 142 Fla. 476, 195 So. 402, we approved the construction of an office building as a proper municipal enterprise and in previous decisions we had approved airports, golf courses, school buildings, and other structures as proper for a city to undertake. . . .

See also *Daytona Beach Racing and Recreational Facilities District v. Paul*, Fla. 1965, 179 So.2d 349, upholding a tax exemption granted by statute to the lessee of city-owned land to be used for recreational purposes. It should be noted, however, that the lessee in this instance was a public corporation created by special act, with bond-issuing and taxing powers to carry out these purposes.

We have also considered the question of whether §196.62 [§196.25], F. S., enacted as Ch. 61-266, Laws of Florida, should be interpreted as showing a legislative intent to exempt leasehold or other contract interests in publicly-owned land when such interests are held by a *nonprofit* corporation. Section 196.25, F. S., was enacted in response to the decision in *Park-N-Shop, Inc. v. Sparkman*, Fla. 1958, 99 So.2d 571, holding that a leasehold interest held by a profit-making corporation for a private purpose in county-owned real property (which property partakes of the inherent right of *immunity* from ad valorem taxation enjoyed by state-owned land) did not fit the description of, and thus could not be taxed as, tangible or intangible personal property under the laws relating to taxation of such property; that there was no provision for the taxation of a leasehold interest apart from the realty; and that the county-owned property was immune from taxation by either the county or city. The court indicated that legislation to "set up machinery" for the taxing of such interests would be appropriate.

This the legislature did by the enactment of §196.25, F. S. Section 196.25(1), F. S., in effect, waived the immunity of the county from taxation insofar as it extended to, and prevented the taxation of, a leasehold interest in county-owned real property, by providing that a leasehold or other contract interest in such property may be assessed and taxed as real estate against a lessee that is using the property "in connection with a profit-making venture." See *Hillsborough County Aviation Authority v. Walden*, *supra*, 210 So.2d 193.

Section 196.25(1), F. S., applies in terms not only to property that is *immune* from taxation, such as county- or state-owned property, but also to property that is merely *exempt* from taxation under applicable constitutional and statutory provisions, such as municipally-owned property. Since it is well settled that the constitutional and statutory *exemption* is lost when the property is no longer used for a municipal or other public purpose, municipally-owned property devoted to a predominantly private use was just as taxable by the county *before* the adoption of §196.25 F. S., see *Panama City v. Pledger*, 1939, 140 Fla. 629, 192 So. 470; AGO 059-49, Mar. 3, 1959, Biennial Report of the Attorney General, 1959-1960, p. 88, as it was *after* the adoption of §196.25, see *Hillsborough County Aviation Authority v. Walden*, *supra*, 210 So.2d 193. Thus, §196.25(1) adds nothing to the taxing power of the county insofar

as property owned by a municipality and used by a profit-making organization for a predominantly private purpose is concerned.

Section 196.25(2), F. S., lists various uses of the property that may be made by the profit-making leaseholder without subjecting him or it to taxation under subsection (1) of said section—all of which appear to be simply a legislative recognition of uses and purposes that have been declared by the constitution and statute, § 192.06[§ 196.191], F. S., and judicial decisions interpreting them, to be the kind of public and general welfare uses as should be, and are, accorded freedom from the burden of taxation. Presumably, such statutory and judicial interpretations of the tax exemption provisions of the 1885 State Const., would be upheld under the new and somewhat different provisions of the 1968 State Const.—as to which no opinion is expressed.

It is well settled that a taxing statute is to be construed in favor of the taxpayer, and that an exempting statute is to be construed in favor of the taxing authority. However, § 196.25, F. S., does both: It provides for a tax on the leasehold interest on the one hand and, on the other, provides for so many exceptions that, in the words of the late Chief Judge Sturgis in *Daytona Beach Racing and Recreational Facilities District v. Paul*, Fla.App.1963, 157 So.2d 156, reversed on other grounds in 179 So.2d 349, the statute "does not provide a competent basis on which to make a finding of legislative intent materially bearing on the issues of this appeal"—namely, whether the public nonprofit corporate lessee of municipally-owned property involved in that case could validly claim the tax exemption accorded to it by the special act creating it. By the same token, the maxim *inclusio unius est exclusio alterius* is of no help here, since it could be applied as well to the excepting § 196.25(2) as to the taxing subsection (1).

There is nothing in § 196.25, F. S., to indicate a legislative intent to overturn the well settled rule, referred to above, that the character of a corporation, whether for profit or nonprofit, is not the test of an exemption status under the applicable constitutional provisions—it is the use of the property for which the exemption is sought that controls. Yet, this would be the effect of holding that a lease to a *nonprofit* corporation—regardless of whether it is for a public or a private use—is not within the intentment of § 196.25(1), F. S. Assuming that, consistent with equal protection and due process requirements, the legislature could validly so provide, another barrier to such an enactment—at least, insofar as municipally-owned property is concerned—is the rule that the constitutional exemption provisions are a limitation on the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly-mentioned classes specified in the organic law itself. *L. Maxcy, Inc. v. Federal Land Bank of Columbia*, 111 Fla. 116, 150 So. 248, 249; AGO 067-57, Aug. 31, 1967, Biennial Report of the Attorney General, 1967-1968, p. 96. As noted above, municipally-owned property under lease to a corporation, whether profit making or nonprofit, for a predominantly private use was subject to county ad valorem taxation under the 1885 State Const., before the enactment of § 196.25, F. S.; thus, to hold that § 196.25 had the effect of *exempting* a nonprofit corporation in such a situation would violate the rule that the legislative power of exemption is limited by the constitution.

In summary, it seems that a nonprofit corporate lessee of property owned by a municipality or other governmental entity entitled to exemption from county ad valorem taxes would have to qualify under the "use" requirements of the constitutional and statutory provisions referred to above in order to continue the exempt status of the publicly-owned property.

070-4—February 2, 1970

FEDERAL COURT ORDERS  
SUPERIOR TO CONFLICTING STATE CONSTITUTIONAL AND STATUTORY PROVISIONS.

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

QUESTION:

Should school superintendents and school board members be advised to obey the law as declared by "direct orders of federal courts" or to disobey such federal court orders in the event Governor Kirk should, by executive order, direct them to do so?

At the time of your request, Governor Kirk had merely threatened to issue such executive order. It had been my hope, as I know it was yours, that this was only bluster and that he would finally act with responsibility and with wisdom in the discharge of his delicate and sensitive responsibility as chief magistrate. He did not sign the order until Friday last, and hence the delay in my response.

To obey or not to obey the law as declared by "direct orders of federal courts"—that is the question which now must be answered. The answer is quite clear. We must all obey the law as declared by direct orders of the federal judiciary. Those direct orders may not be agreeable to us, and they may be loathsome to some, but they are of superior rank in our system of jurisprudence—under our government of laws. This principle is so well established that today most school children know it as well as all law students, lawyers, and, surely, the governor. And our own Florida Supreme Court has pronounced the principle with great clarity.

Governor Farris Bryant and the legislature were faced with a federal order to reapportion. The federal court, by its direct order, declared parts of our constitution and our state laws unconstitutional and prospectively null, void, and inoperative. Faced with this conflict between a direct order of the federal court and the contrary law of our State Constitution and laws, Governor Bryant asked the Florida Supreme Court for an advisory opinion. *In Re Advisory Opinion to Governor Bryant* Jan. 31, 1963, 150 So.2d 721 (Fla. 1963), the court said: "... Without conceding the right, we must concede the power of the federal judicial system to enforce its judgment in this cause. ..." That states the case. Numerous cases and unchallengeable precedents could be cited; but it is not necessary to do so to answer your question fully.

The principle was also written in blood at Appamatox a little over a century ago. And even though you and I, and the Governor, as well as the parents of school children in this state, violently oppose bussing students to achieve integration, and even though we believe some of the orders are totally irresponsible, irrational, and unrealistic, still we are bound to obey and not to defy. We are bound first by the law of our system of law and, second, because to teach defiance and rebellion as high public officials we present a sorry spectacle, a sordid and vulgar example, before the youth of our nation.

Please know of my continued assistance and counsel to you, and the general counsel of the state board of education, to resist with all legal means in the courts the senseless and disruptive bussing policy.

070-5—February 2, 1970

**GOVERNMENTAL REORGANIZATION ACT  
AUTHORITY OF SECRETARY OF DEPARTMENT OF  
PROFESSIONAL AND OCCUPATIONAL REGULA-  
TION IN TRAVEL OF LICENSING BOARDS  
AND PERFORMANCE OF BOARD EMPLOYEES**

*To: Harold W. Stayman, Jr., Secretary, Department of Professional and Occupational Regulation, Tallahassee*

**QUESTIONS:**

1. Does the secretary of the department of professional and occupational regulation have final authority in approving and disapproving out-of-state travel for examining and licensing boards?
2. Does the secretary have authority to review and evaluate the performance of the executive directors of the examining and licensing boards?

These questions go to the very heart of § 30 of the Reorganization Act, Ch. 69-106, Laws of Florida (§ 20.30, F. S.). My staff consulted with the general counsel for the House reorganization committee because of his constant work with this committee and his knowledge of the discussions that transpired in the drafting of the Act. The assistance of Honorable James E. Joanos is gratefully acknowledged.

Section 30(3) of the act (§ 20.30(3), F. S.), makes it clear that there shall not be a director of the division of professions or of the division of occupations and that these two divisions shall be administered directly by the secretary of professional and occupational regulation. It is clear from this subsection that the legislature intended to minimize staff personnel and reduce costs and expenses which is the very purpose of the inclusion in the State Constitution of the mandate to the Legislature to effect an efficient reorganization. This subsection, then, will have no bearing on the decision hereinafter reached.

Section 30(9) of the act (§ 20.30(9), F. S.), appears to be of materiality, and I quote it:

(9) The costs of any of the services provided for the examining and licensing boards shall be prorated among the boards according to the amount of services provided by the department, pursuant to the rules promulgated by the department and approved by the department of administration.

Patently, this section affords the department of professional and occupational regulation not only the opportunity, but also the duty, of receiving from the several boards either a dollar amount or a percentage of each budget of the agency or board, depending upon the quantum of services rendered by the department to each of the agencies. Funds thusly received, whether they be for record keeping, collection of fees and other revenues, payroll procurement, or related administrative functions (see § 6(2) of the reorganization act defining a Type 2 transfer (§ 20.06(2), F. S.), are to be used exclusively as the department may be advised in the providing of these services. Other funds of the individual agencies not transferred to or made available to the department remain in the exclusive control of the several agencies, to be used as they shall see fit in the exercise of the remaining powers, duties, and functions prescribed by law for each of the agencies involved.

With this background, question 1 will be specifically discussed.



Section 3(11) of Ch. 69-106, Laws of Florida (§ 20.03(11), F. S.), defines "agency" in this fashion:

(11) "Agency", as the context requires, means an official, officer, commission, authority, council, committee, department, division, bureau, board, section or other unit or entity of government.

Turning now to § 112.061, F. S., by which statute the legislature made uniform per diem and traveling expenses of public officers and employees, we find under subsection (2)(a), entitled definitions, that agency or public agency is defined as follows:

(a) Agency or public agency—Any officer, department, agency, division, subdivision, political subdivision, board, bureau, commission, authority, district, public body, body politic, county, city, town, village, municipality or any other separate unit of government created pursuant to law.

Having come to the conclusion that properly appropriated funds remaining in the hands of the agency are to be spent by the agency in accordance with applicable law, the further conclusion is reached that the secretary does not have final authority in approving or disapproving out-of-state travel for examining and licensing board members in the event that such travel relates to the functions which have, by the reorganization act, been reserved to the agency.

As to question 2, referring again to the general discussion presented earlier, I come to the conclusion that if the agency has the right and duty to spend its funds which have been retained by the agency pursuant to its budget, then the agency would have the right and the duty to employ and discharge employees of that agency, and the secretary of the department, having no such authority over agency employees, would consequently have no authority either to review or evaluate the performance of the executive directors of the examining and licensing boards.

I reach an opposite conclusion as to those employees, if any, of the several examining and licensing boards which may be transferred to, or paid by, the department for the performance of administrative services specified by § 30, Ch. 69-106, Laws of Florida (§ 20.30, F. S.). Certainly, these employees should have their performance rated and evaluated by the secretary.

070-6—February 4, 1970

#### CRIMINAL PROCEDURE—SEARCH WARRANTS

#### ADMISSIBILITY OF EVIDENCE RELATIVE TO DETECTION OF MARIHUANA BY EXPERTLY-TRAINED DOG USED BY OFFICER IN MAKING SEARCH

To: *Richard E. Gerstein, State Attorney, Miami*

#### QUESTION:

If a dog is expertly trained to detect marihuana by smell, is it lawful for an officer to take such dog to a public school and, when the dog indicates that a desk or locker contains marihuana, search the desk or locker in which the dog indicates the marihuana is contained?

I have discovered no case in point. However, I think that there is sound reason for relying on such a dog's action in smelling out

marihuana. The Florida courts have long sanctioned the admission of testimony, based upon a proper preliminary foundation, that a dog trailed a man from the scene of a crime to some other place. *Davis v. State*, 35 So. 76; *Tomlinson v. State*, 176 So. 543.

In the *Davis* case, text 77, the Sup. Ct. of Fla. said:

... But in order that such testimony be admissible, there must be preliminary proof of such character as to show that reliance may reasonably be placed upon the accuracy of the trailing attempted to be proved. There should first be testimony from some person who has personal knowledge of the fact that the dog used has an acuteness of scent and power of discrimination which have been tested in the tracking of human beings. The intelligence, training, and purity of breed are all proper matters for consideration in determining the admissibility of such evidence, as is also the behavior of the dog in following the track pointed out. . . .

And in the *Tomlinson* case, text 545, that court pointed out that a "proper preliminary foundation" must be laid before the admission of such evidence. A further discussion of the requisite foundation is to be found in 22A C.J.S. 533 *et seq.*, Criminal Law, § 646.

It is therefore clear that, with the proper foundation being laid, the actions of a dog in trailing a man can be relied upon in court. By analogy, logic and common sense indicate that, with the proper foundation being laid, the actions of a dog in indicating that a desk, locker, or some other place contains marihuana can be relied upon in court.

I suggest that it would be a wise precaution for an officer to obtain the permission of the school board before taking dogs into a public school building for this purpose.

What should be done if a dog locates a school desk or locker containing marihuana? It may be that, as against the officer, a student has a right of privacy in such desk or locker by reason of its having been assigned to him individually or jointly with other specified students. If such a right of privacy exists, then I think that the officer should procure a search warrant before searching the desk or locker. And I suggest that the affidavit for search warrant should lay the same foundation as is requisite in the trial of a criminal case.

070-7—February 4, 1970

#### SALES TAX ON COMMERCIAL RENTALS

#### LIABILITY FOR INTEREST ON CONTROVERTED TAXES— § 212.12, F. S.

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

#### STATEMENT OF FACT:

On October 28, 1969 the Leon County circuit court entered a final decree in the matter of *Lazarus v. Claude R. Kirk, Jr., et al.*, Circuit Court Leon County, Case #69-287<sub>A</sub> (Taylor). The decree required collection "as tax deficiencies" of all sums due for sales tax on commercial rentals after April 1, 1968, under the court's construction of § 212.03(1), F. S., as amended by Ch. 68-27, Laws of Florida. The decree found that Rule 318-1.70(12) of the State Revenue Commission (now the Department of Revenue) restricting the tax to "that portion of the rent which applies to the building," was void *ab initio*, and held that

the tax imposed by § 212.03(1) on rental of "commercial offices or buildings" was intended to be a tax on the total rent charged without apportionment between building and land.

#### QUESTION:

Based upon the above statement of fact may the department of revenue waive interest on tax moneys paid to the department in accordance with the court's order?

The controlling statute, § 212.12, F. S., states in part:

(3) When any dealer, or other person charged herein, fails to remit the tax, or any portion thereof, on or before the day when such tax shall be *required by law to be paid*, there shall be added to the amount due interest at the rate of six percent per annum *from the date due* until paid. (Emphasis supplied.)

(4) All penalties and interest imposed by this chapter shall be payable to and collectible by the department in the same manner as if they were a part of the tax imposed.

(5) The department, for good cause shown by written request, may extend, but not to exceed thirty days, the time for making any returns required under the provisions of this chapter, and may compromise penalties after its investigation reveals that the penalty would be too severe or unjust, *but interest shall be collected*. (Emphasis supplied.)

Although the latter provision, § 212.12(5), F. S., makes a clear distinction between penalties, which are within administrative waiver authority, and interest, which is not, it is apparent from the recited facts that until the entry of the decree in question, the taxes "required by law to be paid" were those due under the law as defined by the administrative regulation. The "date due," from which interest is to be calculated on additional taxes required by the court, is, therefore, the date of the decree striking the rule and adjudicating the application of the statute.

The decree makes no specific provision for interest or penalty, requiring only the collection of the moneys in question "as tax deficiencies." The Florida court in *State v. Lee*, 127 Fla. 112, 172 So. 722, 727, stated the general rule of liability for interest on controverted taxes but affirmed the propriety of calculating interest from the date of a judicial determination, rather than the date of payment fixed by statute, when the property subject to taxation is not otherwise fully identified or the amount of taxes determined. This is in accord with general authorities recognizing that until the amount of the tax is fixed, so that the taxpayer may know with certainty the amount he is required to pay, it is inequitable and improper to charge him with interest. *Anno*. 147 A.L.R. 142. *Dravo Contracting Co. v. James*, C.C.A. 4, 114 F.2d 242.

I believe, therefore, that tax moneys paid to the department in accordance with the court's order dated October 28, 1969, i.e., taxes on that part of commercial rentals attributed to land, should bear interest from that date rather than the time when the taxable transaction occurred.

070-8—February 27, 1970

**INTANGIBLE PERSONAL PROPERTY TAX  
LIABILITY FOR TAX ON POLICY LOANS MADE BY INSURANCE  
COMPANIES TO INSURED UNDER UNMATURED LIFE  
INSURANCE CONTRACTS**

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

**QUESTION:**

Is an insurance company liable for an intangible personal property tax on policy loans made to its insureds under unmatured life insurance contracts?

It is assumed, for the purpose of this opinion, that the insured did not, in connection with the policy loan, execute a promissory note or other agreement sufficient to bind him absolutely, as a debtor, to a personal obligation to pay to the insurer the amount of the policy loan; and this opinion is premised on that assumption.

Section 199.011, F. S., defines intangible personal property as "all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents." It is axiomatic that the item sought to be taxed must have a presently ascertainable value as an asset of the estate of the owner-taxpayer or the estate of the beneficiary, when the taxpayer is a fiduciary, in order to be subject to an ad valorem tax. The crucial question, then, is whether a policy loan is of value to, and an asset of, the insurance company sufficient to justify the imposition of an ad valorem tax on such loan against the insurance company.

This question was answered in the negative by the U. S. Sup. Ct. in *Board of Assessors v. New York Life Ins. Co.*, 1910, 216 U.S. 517, 30 Sup. Ct. 385, 54 L.Ed. 597, in construing a Louisiana statute providing for a property tax on "credits, money loaned, bills receivable." The board of assessors had assessed a property tax on policy loans made by the defendant life insurance company to its insureds in Louisiana on the theory that such policy loans were "credits" within the jurisdiction of, and subject to, the taxing power of the state. In holding that such policy loans were not taxable, the court noted that, while referred to as a "loan," the transaction had none of the characteristics of a debtor-creditor relationship. Its conclusion was stated as follows:

The so-called liability of the policy-holder never exists as a personal liability, it never is a debt, but is merely a deduction in account from the sum that the plaintiffs ultimately must pay. In settling that account interest will be computed on the item for the reason that we have mentioned, but the item never could be sued for, any more than any other single item of a mutual account that always shows a balance against the would-be plaintiff. In form it subsists as an item until the settlement, because interest must be charged on it. In substance it is extinct from the beginning, because, as was said by the judge below, it is a payment, not a loan.

The court previously stated that the sum charged as "interest" on the policy loan represented the amount estimated which the sum would have earned had it been retained by the insurance company.

Since that decision, courts of other jurisdictions and the federal courts, as well as recognized text authorities, have followed the prin-



ciples enunciated in board of assessors, *supra*, concerning the nature of a policy loan in various situations. See 44 C.J.S., Insurance, § 337, p. 1291, stating that a policy loan is not a "loan" in the ordinary sense of the word; that it "is merely a deduction from the sum insuror ultimately must pay, and is more accurately described as an advance." Accord: 43 Am.Jur.2d, Insurance, § 650, p. 652. See also *In re Schwartz*, Pa. 1952, 87 A.2d 279, 31 A.L.R.2d 975, and *In re Cummings' Estate*, 105 N.Y.S.2d 104, holding that a policy loan is not a debt of the estate, so that the beneficiary under the life insurance policy takes the proceeds of the policy less the deduction for the advances made as policy loans during the lifetime of the insured; and *United States v. Sullivan*, 333 F.2d 100 (C.A. 3, 1964) and *United States v. Miroff*, 353 F.2d 481 (C.A. 7, 1965), which stand for the proposition that the government cannot reach the cash surrender value of any policy loans under unmatured life insurance policies to satisfy a tax lien against the taxpayer-insured in a suit directly against the insurance company. In the *Sullivan* case the court said that policy loan disbursements are "compulsory advances *pro tanto* of the cash surrender value" that do not create a creditor-debtor relationship "but only suffice to discharge part of the insurer's ultimate policy obligation" to the insured. 333 F.2d at p. 112.

That a policy loan does not represent anything of value to and is not an asset of the insurer is made clear when its nature is further considered. In *Williams v. Union Central Life Ins. Co.*, 1933, 291 U.S. 170, 78 L.Ed. 711, the court pointed out that the cash surrender value of a life insurance policy is equal to the reserve maintained by the insurer, at any given date, to cover such policy. The "reserve" and "surrender" values were described as follows:

With the mortality table and an assumed rate of interest on the investment of premiums received, the amount of the accumulated savings on this basis, at any date, can be mathematically computed. This amount constitutes the "reserve" against the policy or its net value. The insurer must have on hand the aggregate amount of these reserves against its outstanding policies. And in case of lapse, after a policy has been in force for a specified time, its net value or "surrender value," less surrender charges, is made available to the policy holder.

The policy reserves are, of course, carried on the books of the insurer under "liabilities" since they represent an obligation to its insureds. And, as noted above, the advances to its insureds represented by policy loans from these reserves automatically reduce the amount of the insurer's obligation to its insureds *pro tanto*. The fact that policy loans are carried on the books of the insurer under "assets" instead of being shown as a deduction from policy reserves on the "liabilities" side of the ledger is apparently only for accounting purposes. See *United States v. Sullivan*, *supra*, 333 F.2d 100, 112, in which it was said that this is simply an accounting procedure "necessary to meet the solvency requirements of state law" and does not change the "well-settled concept" of a policy loan as an advance *pro tanto* of the cash surrender value of the policy, and not a loan.

In the light of the universal rule respecting the nature of the insurer's interest in a policy loan, there would be no difficulty in concluding that the insurer could not be subjected to an intangible personal property tax on the amount of such loans, were it not for an opinion rendered by one of my predecessors in office to the then comptroller under date of Nov. 16, 1940. It was there held that a policy loan was subject to an intangible personal property tax under the

"catch-all" classification (then Class C and now Class D), i.e., "all other intangible personal property not embraced in" the preceding classes. § 199.022, F. S. The basis for this conclusion was that the policy loan provided for interest and that this provision "imparts real value to the piece of paper upon which the contract is set forth." A further reason given was that the money advanced to the insured would have been taxable had it remained a part of the insurer's policy reserves.

The last statement—concerning taxability of the advance if it had remained in the insurer's hands—loses its force when it is remembered that the moneys advanced to the insured are equally taxable in the hands of the insured as in those of the insurer.

And the fallacy of the statement concerning "interest" is equally plain, when considered in the light of the discussion above. Here, again, there is no personal obligation on the part of the insured to pay the interest. If he decides to let the policy lapse, the amount of the accrued interest, along with the amount of the advance, will be deducted from the cash surrender value of the policy. As in the case of the advance, the interest charged is simply another *quid pro quo*: Money is advanced to the insured by the insurer in exchange for a release, *pro tanto*, of its ultimate obligation under the contract. And the charge made for interest on the advance may be said to be in exchange for the loss sustained by the insurer as a result of advancing these moneys to the insured. No tangible gain—nothing of real value—has accrued to the insurer from either the advance or the interest charged.

Your question is, therefore, answered in the negative; and insofar as the opinion of this office dated Nov. 16, 1940, addressed to the then comptroller, is in conflict herewith, it is withdrawn.

070-9—February 27, 1970

#### REGULATION OF PROFESSIONS AND VOCATIONS

##### LANDSCAPE ARCHITECTS' ORGANIZATION OF PROFESSIONAL CORPORATION—PURPOSE—CONSTRUCTION OF CHS. 481 AND 621, F. S.

To: P. D. Shoemaker, Chairman, Florida Board of Landscape Architects, Jacksonville

#### QUESTION:

Is the practice of landscape architecture as defined in Ch. 481, F. S., a profession within the meaning of the professional service corporation act?

At the outset, I call your attention to § 481.011(3), F. S., which discusses the rendering of professional services within the definition of landscape architecture. I further direct your attention to § 30(10)(h), Ch. 69-106, Laws of Florida (§ 20.30(10)(h), F. S.), wherein the legislature specifically classified the board of landscape architects within the definition of professions, which is additional recognition by the legislative branch of government that the profession and practice of landscape architecture is in fact a profession and not an occupation.

With respect to the practice of landscape architecture, § 481.081(2), F. S., clearly prohibits the issuance of a license to a corporation for the purpose of engaging in the practice of landscape architecture in its corporate name or otherwise. This legislative announcement with respect to the profession of landscape architecture appears to be consistent with the general rules governing most professions wherein the primary relationship is that of the professional with his client.

Turning now to Ch. 621, F. S., your attention is directed to § 621.01, which states:

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

In defining the term "professional service" the legislature went on to say, in § 621.03(1), F. S., in part:

The term professional service means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this act and by reason of law could not be performed by a corporation. . . .

In a discussion of the professional service corporation act, the Sup. Ct. of Fla., in *In the Matter of The Florida Bar*, 133 So.2d 554 (1961), recognized the fact that the basic purpose of said act was to enable the practitioners of their various professions who previously were not permitted to incorporate now to do so for the purpose of deriving certain corporate benefits such as the establishment of a pension for the benefit of employees which was not previously available to the various professional groups.

This view was further fortified when the Sup. Ct. of Fla., in *Street v. Sugarman*, 202 So.2d 749 (1967), reiterated and clarified the purpose and intent of Ch. 621, F. S. The court at p. 751 stated:

We noted in the case of *In re The Florida Bar, Fla.*, 133 So.2d 554, 4 A.L.R. 3d 375, that professional service corporations evolved and were designed primarily for the purpose of allowing various professions, not previously privileged to incorporate, to form organizations that would legitimately qualify for certain tax or retirement advantages available to corporations. The privilege of incorporation was most definitely not created or extended in order that those availing themselves of the benefits could be cloaked with an immunity inimical to legal order and public interest.

Thus, it appears that a landscape architect could not, pursuant to § 481.081(2), F. S., be licensed as a corporate entity to do business in the traditional sense. However, an individual or group of landscape architects could incorporate pursuant to Ch. 621, F. S., for the limited purpose of availing themselves of certain tax and retirement advantages made available by the enactment of the above-cited chapter.

In conclusion, it is pointed out that although your question is answered in the affirmative, the corporate status achieved by and through the provisions of Ch. 621, F. S., could not be used to create a corporate veil designed to defeat the traditionally recognized professional-client relationship.

070-10—February 27, 1970

#### TAXATION

#### TAX DISCOUNTS—EXTENSION OF DISCOUNT PERIOD

To: *Ted Williams, Tax Assessor, Dade City*

## QUESTION:

Does the county tax assessor have any legal authority to grant, extend, or otherwise change any of the discounts offered by the tax collector in carrying out his legal duties of collecting taxes?

Your question is answered in the negative by an earlier opinion of this office stating: "Discounts for tax payments made . . . by tax collectors, should be made only *when authorized by the state comptroller [now the department of revenue].*" (Emphasis supplied.) Attorney General Opinion 065-90, Aug. 6, 1965, Biennial Report of the Attorney General, 1965-1966, p. 125:

Although §§ 193.41, 199.16 and 200.26, F. S., provide for discounts for taxes paid in Nov., Dec., Jan., and Feb., no statute or constitutional provision makes specific provision for discounts where the tax rolls are not open for payment on Nov. 1, of the tax year and the right to make payment is delayed without the fault of the taxpayers. In most instances where, by reason of litigation or otherwise, there is a material delay in the opening of the tax roll for the payment of taxes there has been granted the right to have the discount notwithstanding the delay, so long as the books will be open for payment within a reasonable time. In *Green v. Walter*, Fla., 161 So.2d 830, because of litigation the intangible tax roll was not delivered to the tax assessor until around the first of March; the Sup. Ct. permitted a 4% discount if paid within the first 30 days after the tax roll came into the hands of the tax collector, but no discount after the said 30 days. In other cases the comptroller has authorized discounts of 4% for the first 30 days after the tax roll was open for payment, with the normal discount for the period following said 30 days, that is, as specified in said §§ 193.41, 199.16 and 200.26, F. S. Under this practice a tax roll opened for collection on Jan. 1, would be subject to a 4% discount during January but only 1% discount in February. . . .

These conclusions do not appear to be affected by any subsequent change in law, and official minutes of the department of revenue for Nov. 18, 1969, reflect the department's approval of extensions of the discount period, indicating that the administrative practice remains the same.

070-11—March 2, 1970

## TAXATION

SALES TAX—RENTALS OF TANGIBLE PERSONAL  
PROPERTY, STATE AND NATIONAL BANKS—  
CONSTRUCTION OF § 212.02(2), F. S.;  
§ 5219, REV. STAT.; 12 U.S.C. 548

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

## QUESTION:

Will the tax imposed by Ch. 212, F. S., on rentals of tangible personal property apply to rental payments made by banks to lessors of such property after Dec. 24, 1969, under rental contracts entered into prior to Sept. 1, 1969?



Section 5219, Revised Statutes (12 U.S.C. 548), has been amended by Public Law 91-156 to provide that a state may impose any nondiscriminatory tax such as that in question, with the exception, § 5(c), that:

(c) No sales tax or use tax complementary thereto shall be imposed pursuant to this paragraph 5 upon purchases, sales, and use within the taxing jurisdiction of tangible personal property which is the subject matter of a written contract of purchase entered into by a national bank prior to September 1, 1969.

The exclusion accordingly prohibits taxes on *purchases, sales, and use* of property which is the subject matter of a "written contract of purchase" entered into prior to September 1, 1969. (Emphasis supplied.)

Section 212.02(2), F. S., provides that the word "sale" shall "when used in this chapter" mean any transfer of title or possession, including lease or rental, except where a context clearly indicates a different meaning. Although this definition is, as stated, controlling in determining the meaning of such terms when used in Ch. 212, F. S., the opinions applying this provision indicate these definitions are applicable to such terms only when repeated in the same statute. *Richard Bertram and Co. v. Green* (Fla. 1961), 132 So.2d 24, 26. It is equally clear that rental transactions, even under our statute, must for many purposes be treated as transactions quite distinct from sales and purchases generally, the tax on rentals being imposed only at the time the property is actually furnished and rentals paid for each rental period, rather than upon execution of a contract for such rentals. *Kirk v. Western Contracting Corp.*, Fla. 216, So.2d 503; *Florida Revenue Commission v. Maas Brothers, Inc.*, Fla. 226 So.2d 849.

I conclude, therefore, that the language of § 5(c) of the amendment above cited must be construed in its ordinary and literal sense and without reference to the variant definitions stated in the Florida law. The federal law, excluding taxes on "*purchases, sales, and use*" under "written contract of *purchase*," contains no reference to rentals, and in my opinion the tax imposed by Ch. 212, F. S., on rentals applies to rental payments after Dec. 24, 1969 (effective date of the amendment), under rental contracts entered into prior to Sept. 1, 1969. (Emphasis supplied.)

070-12—March 2, 1970

#### STATE FUNDS

#### INVESTMENTS—DEMAND ACCOUNTS MAINTAINED FOR OPERATIONAL PURPOSES—CONSTRUCTION OF § 18.10, F. S.

To: *Broward Williams, State Treasurer, Tallahassee*

#### QUESTION:

May the state board of administration invest funds held available for operational purposes in demand accounts in banks designated by the board, in 3- to 15-day U. S. treasury bills?

The governor, comptroller and state treasurer, as the state board of administration, are authorized to deposit money of the state or funds in the state treasury in banks of the state which offer satisfactory collateral security, subject to maintaining in demand accounts funds adequate for state operational purposes.

Excesses above operational requirements may be placed in interest-bearing time deposits in banks of the state designated by the board as state depositories under terms and conditions and at rates to be determined from time to time by the board. Significantly, those rates are required to be within the limits allowed by federal banking regulations.

In determining conditions and interest rates of such time deposits the board is required to consider the following as stated in § 18.10(1), F. S., in part:

- (a) The prevailing rate of U. S. treasury bills;
- (b) The value of the services performed by the banks to the state;
- (c) The value accruing to the economy of the communities of the state as a result of the state depositing its funds in banks of the state.

In addition to the above legislative mandates the board is authorized to invest funds not needed for operational purposes in short term direct obligations of the U. S. treasury due within one year from purchase and maturing on dates the funds are anticipated to be needed when "*a majority of the banks of the state are unwilling to accept the interest-bearing time deposits on the terms, conditions and rates determined*" by the state board of administration. § 18.10(1), F. S. (Emphasis supplied.)

A distinction is to be made between funds available for deposit and investment in United States obligations upon the failure of the banks of the state to accept certificates of deposit, and funds available for investment by the state board of administration under § 215.44, F. S., as amended—i. e., trust funds and agency funds submitted to the board for investment.

The deposit of operational funds in demand accounts and the purchase of interest-bearing time deposits with funds in the state treasury not needed for state operational purposes is the responsibility of the state board of administration.

Only those funds eligible for investment in interest-bearing time deposits are recognized by the legislature as eligible for investment in short term obligations of the U. S. treasury, and then *only when banks of the state refuse to accept the state's terms on interest-bearing time deposits*.

Your inquiry states that no such condition exists at this time or has to your knowledge existed at any time in the past. It is well settled that the mention of one thing in a statute implies exclusion of another. *O'Brian Associates of Orlando, Inc., v. Tully*, 184 So.2d 202. Also, when not otherwise provided in Constitution, duties of officers performing executive and administrative governmental functions shall be fixed by law. *Dade County v. State*, 116 So. 70, 95 Fla. 465; *City of Miami Beach, Fla. v. State*, 116 So. 480, 95 Fla. 697.

The clear and unequivocal language providing for the maintenance of demand accounts as the repository of funds necessary for state operation negates authority of the state board of administration to make any *investment* of funds that are necessary for operational purposes. Such funds must be maintained in demand accounts under provisions of § 18.10, F. S.

070-13—March 6, 1970

## PUBLIC OFFICERS

CONSTITUTIONAL LIMITATION ON NUMBER OF OFFICES  
TO BE HELD SIMULTANEOUSLY—ART. II,  
§ 5, STATE CONST.—CONSTRUCTION OF  
TERMS "OFFICER" AND "EMPLOYEE"*To: Norton Josephson, City Attorney, Daytona Beach*

## QUESTION:

Is the holding by one person of the position of city attorney of one municipality and at the same time holding the office of associate municipal judge of another municipality, in violation of Art. II, § 5, of the 1968 State Const.?

Article II, § 5, State Const., prohibits the holding simultaneously of more than one office under "the state and the counties and municipalities therein . . ." The fact that the positions you describe are in different municipalities would not be significant under the wording of the above constitutional provision. The important consideration is whether the position of city attorney for the City of South Daytona constitutes an "office," as opposed to mere employment, under the State Const. You have stated that the position of associate municipal judge is an office.

It was stated in two previous opinions construing this constitutional provision (AGO's 069-2 and 069-3, of this publication) that the term "office" implies a delegation of a portion of the sovereign power to the person filling the position. In the prior opinion, city attorneys were included in the following excerpt:

Municipal officers are defined in 27A Words and Phrases, Perm. Ed. 546-551, as persons who hold municipal office, including chiefs of police, city attorneys, city engineers, commissioners, mayors, councilmen, sealers of weights and measures, police magistrates, policemen, tax collectors, treasurers, etc., when such officers are vested with official powers and duties for and in behalf of the municipality in question. . . . Section 37, Chapter 14591, Laws of Florida, 1929, provides in part that, "The City Commission shall *appoint* a City Attorney" (Emphasis supplied.); other statutes might use the word "employ" a city attorney. The term "appoint" would seem to indicate the selection of an officer, while the word "employ" would seem to indicate the employment of an employee. However, I feel that this would not be conclusive, and that the entire statute or law would have to be resorted to and construed.

State, county, and municipal officers within the purview and intention of the last sentence of §(5)(a), Art. II, of the 1968 State Const., are those persons who are *invested by law with official duties and powers*, and would not include those persons who are mere employees and who are not invested with official powers and duties in their own right, although they may exercise such powers and duties as the agent of an officer.

The charter act here involved, § 28, Ch. 27898, Laws of Florida, 1951, specifies that the city council shall "appoint" a city attorney. The act also invests the city attorney with official duties and powers, among which is to act as prosecutor in the municipal court and to endorse his

approval on all contracts and bonds, etc., of the city. These contracts are not valid until his approval is so endorsed. In addition, § 154, Ch. 27898, Laws of Florida, 1951, provides that no suit may be brought against the city until notice of injury is given, within ninety days, to the city attorney. Said chapter also delegates to the city attorney the power to "select" an assistant city attorney. All of the above duties and powers represent exercise of a portion of the sovereign authority. (See AGO 069-2, of this publication.) A mere employee has no such power or discretion. (See 81 C.J.S. *Social Security and Public Welfare*, §§ 69, 70; see also 62 C.J.S. *Municipal Corporations*, § 695, which indicates that generally the city attorney is an officer of the city and exercises a portion of the sovereign power when performing his duties connected with the city's legal business; that a city attorney endowed with the authority of city prosecutor is a quasi-judicial and executive officer.)

In view of the above-quoted ruling of this office and a subsequent opinion holding that a city attorney under a similar statute is an officer for purposes of the constitutional provision here involved (AGO 069-3, of this publication), it is my conclusion that the provisions of Ch. 27898, Laws of Florida, 1951, creating the position of city attorney of the City of South Daytona indicate an intent to create an office and not an employment for purposes of Art. II, § 5 of the State Const. Your question is therefore answered in the affirmative.

070-14—March 6, 1970

#### TAXATION

##### INTANGIBLE PERSONAL PROPERTY TAX— FAILURE TO RETURN—CALCULATION OF PENALTIES

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

#### QUESTIONS:

1. If intangible personal property is returned at less than its just valuation as required under Ch. 199, F. S., and such fact is discovered prior to the meeting of the board of tax adjustment and the proper procedures are followed under §§ 199.121 and 199.151, F. S., by the assessor and the board of tax adjustment, should the assessor include as a part of the tax the penalty provided for in § 199.321, F. S.?

2. If the answer to the above question is in the affirmative, should the penalty be calculated upon the entire amount of the tax found to be due or only upon the amount of the difference between the tax based on the taxpayer's return and the total tax found to be due by the assessor?

3. If intangible personal property is returned at less than its just valuation as required under Ch. 199, F. S., and such fact is not discovered until after the meeting of the board of tax adjustment, when the assessor proceeds to assess the undervalued property in compliance with § 199.311, F. S., should the assessor include as a part of the tax the penalty provided for in § 199.321, F. S.?

4. If the answer to question 3 is in the affirmative, should the penalty be calculated upon the entire amount of the tax found to be due based upon the corrected valuation or only upon the amount of the difference between the tax based upon



the taxpayer's return and the tax found to be due by the assessor?

5. When an assessor is proceeding under either § 199.311 or § 199.321, F. S., to assess intangible personal property which has escaped taxation or has been undervalued, does the monthly interest of one percent provided for in § 199.321, F. S., begin to accrue from the date the tax is due for the year in which the assessment is made or from the date the tax would have been due in the year in which the assessment should have been made?

Question 1 is answered in the affirmative.

Section 199.321, F. S., reads as follows:

Failure to file return and pay the tax when due.—If any intangible personal property is not returned for taxation by the persons required to return it, within the time and in the manner required by this chapter; or if any intangible personal property is returned at less than its just valuation as defined in this chapter; there shall be added as a part of the tax a penalty in the amount of ten per cent of the tax found to be due, and an interest of one per cent per month from the date the tax should have been paid.

The provisions of § 199.321, F. S., are mandatory in nature. The penalty must be applied, and the only question which remains is what event warrants penalization. Although there are no relevant decisions in the intangible tax area, an analogy can be drawn to a decision concerning the penalty provisions of the tangible personal property act. In the case of *Tampa Gas Co. v. Sparkman*, 153 Fla. 205, 14 So.2d 197 (1943), the Sup. Ct. of Fla. stated:

The penalty does not augment the valuation. It is imposed for neglect to perform a duty. The legislature may require the owners of property to return their property for taxation. The property owner may avoid the penalty by discharging his lawful duty. So long as the penalty is not unreasonable or arbitrary it will be upheld.

The same reasoning is applicable to the penalty provisions regarding returns on intangible personal property. Section 199.321, F. S., recites a penalty: "If any intangible personal property is not returned . . ." or . . . "returned at less than its just valuation . . ."

Section 199.101, F. S., requires returns to be filed by April 1. Therefore, at the time of filing of an improper return the penalty provision may be applied.

If a tax assessor wishes to change the valuation of a return in accordance with § 199.121, F. S., he may properly add the ten percent penalty. If the taxpayer appeals the higher valuation to the board of tax adjustment and prevails, then he would obviously not be liable for the amount of the penalty.

Also, if the assessor exercised the power granted by § 199.311, F. S., and sought an additional assessment in one or all of the three previous years, the penalty provision of § 199.321, F. S., would be applicable.

As to question 2, the penalty should be calculated upon the entire amount of tax found to be due.

The legislative history of § 199.321, F. S., is important in answering your second inquiry.

The relevant portion of § 32, Ch. 20724, Laws of Florida, 1941, states:

Any person who fails to make a tax return or fails to include in his return all of his intangible personal property subject to taxation, as required by this Act, shall pay in addition to and as part of the tax *a sum equal to ten per cent (10%) of the tax found to be due*, with interest on the entire amount from the date the return should have been filed at two per cent (2%) per month, until it is paid... (Emphasis supplied.)

In 1945 the language was changed by § 9, Ch. 22867, Laws of Florida, 1945, to read:

Any person who fails to make a tax return as required by this Act, shall pay as a penalty, in addition to and as part of the tax a sum equal to ten per cent (10%) of the tax *found to be due*. A taxpayer making a return and who fails to include therein all of his Intangible Personal Property subject to taxation, as required by this Act, shall pay as a penalty, in addition to and as part of the tax *a sum equal to ten per cent (10%) of the tax found to be due upon that part of his Intangible Personal [P]roperty which he fails to include in his return*. All taxes together with any penalties shall draw interest at the rate of one per cent (1%) per month from the date the said taxes become delinquent until [sic] the same shall be paid. In making a back assessment of omitted property, there shall be added as a penalty the sum of ten per cent (10%) of the tax per annum from the date such tax should have been paid. (Emphasis supplied.)

The origin of present § 199.321, F. S., quoted above is found in § 32, Ch. 65-389, Laws of Florida, which repealed the prior law.

The 1945 statute clearly applied the penalty only to that portion not properly reported. This was a specific change from the language of the earlier statute. Then, in 1965 we find the legislature using language similar to that of the original (1941) enactment. It seems clear that the omission of the words, "upon that part of his intangible personal property which he failed to include in his return," was made for a more cogent reason than mere streamlining. The legislature intended that the penalty percentage be calculated on the amount of the *entire* tax due, not that portion omitted.

The answer to question 3 is dependent upon the period encompassed and the timing of an assignment of a higher valuation by a tax assessor.

Section 199.311, F. S., which authorizes an assessor to assess additional taxes during any or all of the three previous years, is limited by § 199.121, F. S. Section 199.121, F. S., gives the taxpayer the right to appeal a higher assessment to the board of tax adjustment.

Therefore, an assessor could not set a higher valuation for the current tax year, after the board of tax adjustment has met, since this would not afford the taxpayer his procedural remedies.

However, this is not to say that the assessor cannot substitute his higher valuation in the succeeding tax year in accordance with § 199.311, F. S. This should be done so as to allow the taxpayer the opportunity to appeal the higher valuation in accordance with § 199.121, F. S.

The answer to question 4 is the same as the response to question 2 in those instances where a penalty is applicable.

The answer to question 5 is that the one percent interest provided by § 199.321, F. S., begins to accrue from the date the tax would have

been due in the year in which the higher assessment should have been made.

My answers to your other questions make clear that the procedures set forth in Ch. 199, F. S., provide the maximum protection for the taxpayer.

Section 199.321, F. S., provides for the one percent interest to run from "the date the tax *should have been paid*." (Emphasis supplied.) When a back assessment is made, under § 199.311, F. S., the higher tax is not due until all the remedies provided the taxpayer are exhausted. The interest provision is compensatory in nature and runs from the optimum time granted the taxpayer for payment. In accordance with § 199.211, F. S., the date is April 1 of the year following that in which the higher or omitted valuation should have been returned, and is the maximum time granted for payment, and the interest runs accordingly from that date.

070-15—March 6, 1970

**PUBLIC OFFICERS AND EMPLOYEES**  
**NEPOTISM—APPLICATION OF STATE ANTINEPOTISM**  
**ACT § 116.111, F. S., TO MEMBERS OF**  
**HILLSBOROUGH COUNTY CIVIL SERVICE BOARD,**  
**CH. 65-697, LAWS OF FLORIDA**

To: *Paul A. Saad, Attorney, Hillsborough County Civil Service Commission, Tampa*

**STATEMENT OF FACTS:**

Members of the civil service commission are called upon from time to time to approve increases in pay for certain classifications of employees who are subject to the civil service law. Some of the members of our commission are married to employees of the county who could conceivably be the beneficiary of such pay increases, even though such pay increases would not be designed directly to benefit relatives of the members. In other words, we are speaking of a class of employees and not individuals. However, it is conceivable that an employee may be suggested for promotion by an agency head which might have to be approved by the civil service commission.

You posed the following question:

**QUESTION:**

Are members of the Hillsborough County civil service commission prohibited from acting as such if they have relatives subject to the civil service law, in view of the provisions of Ch. 69-341, Laws of Florida?

Since the persons involved, under the facts you relate, are not to be employees of the civil service board, the antinepotism act requires that the employing agency is one over which the civil service board "exercises jurisdiction or control." In that connection it is to be noted that § 2(1)(b), Ch. 69-341, Laws of Florida(§ 116.111, F. S.), states in part: "Mere approval of budgets shall not be sufficient to constitute 'jurisdiction or control' . . . ." I note also that the definition of a "public official" is one in whom the authority to "appoint, employ, promote, or advance individuals" or to "recommend" such actions is vested. In a strict sense, members of the civil service board can take none of these steps. They can approve pay increases already granted for "certain classifications of employees" and otherwise must carry out specific

duties in the selection or promotion process, but their authority is carefully circumscribed by a statute which draws an emphatic distinction throughout between the "appointing authority" on the one hand and the "board" on the other. For instance §15, Ch. 65-697, Laws of Florida, states in part as follows:

Section 15. Whenever a position in the classified service becomes vacant the appointing authority, if he or it desires to fill the vacancy, shall make requisition upon the board for the names and addresses of persons eligible for appointment there-to.... The appointing authority shall thereupon make an appointment from the names certified as eligible....

A very detailed procedure is set out in the act for the establishment of the employment list, referred to in §15, Ch. 65-697, Laws of Florida, through the mandatory holding of periodic examinations. Section 13 of said chapter states that "Such tests shall be public, competitive and open to all persons who may be lawfully appointed to any position within the class for which such examinations are held." (Emphasis supplied.) The law further states that no question in the test shall relate to "political opinions or affiliations." As to pay rates, §9 of said chapter among other things, requires the board to:

...adopt a uniform personnel program, with rules which shall be uniformly administered and applied including a classification and pay plan, examinations, appointments, ... promotions, transfers and all other required personnel policies....

In §18 of Ch. 65-697, Laws of Florida, there is strict language dealing with any obstruction to the examination procedure. The section also states as follows:

...No person shall solicit, orally or by letter, and no public officer or employee shall receive or be in any manner concerned in receiving or soliciting, any money or valuable thing from any officer or employee holding a position in the classified service for any political party or purpose whatsoever. No person shall use or promise to use his influence or official authority to secure any appointment or prospect of appointment to any position classified under this act as a reward or return for personal or partisan political service....

The section also states that salaries are increased by the "employing authority" as opposed to the board, with the latter reviewing the action.

Section 21, Ch. 65-697, Laws of Florida, provides safeguards to employees with regard to suspensions and dismissals. The person whose removal is sought must be given reasonable notice of the action as well as the charges preferred against him and an opportunity to answer these before the board.

Reading the above-quoted language and the act as a whole, it is clear that the Hillsborough County civil service board must conform to strict statutory procedures enacted for the purpose of avoiding, among other evils, the placement of relatives or any other persons on the public payroll for reasons other than merit. The board's role is that of watchdog and reviewing tribunal to insure fair personnel practices. There is a clear distinction in the act between the appointing or employing authority and the board which reviews actions taken by such authority. For this reason, in my opinion, the board fails to qualify as a "public official" under the definition prescribed by Ch. 69-341, Laws of Florida (§116.111, F. S.).

In addition, the Florida Supreme Court, passing upon an earlier



antinelopism statute, held that laws of this type, having a high penalty, must be strictly construed. *State ex rel. Robinson v. Keefe*, 149 So. 638. My letter of June 18, 1969, to the Honorable Claude R. Kirk, Jr., Governor, cited this case and concluded that the nepotism act here under review could not require the discharge of persons employed prior to its effective date. It is to be noted also that both the 1885 State Const., Art. XVI, § 34, and the new State Const. of 1968, Art. III, § 14, authorize the creation of civil service systems for county employees.

In view of the above language of Ch. 65-697, Laws of Florida, the definition of "public official" in the antinelopism act, and previous rulings of the Supreme Court and this office, it is my opinion that the answer to your question is in the negative. The antinelopism statute does not prohibit members of the civil service board of Hillsborough County with relatives in the civil service from carrying out their responsibilities under Ch. 65-697, Laws of Florida.

070-16—March 11, 1970

### TAXATION

#### ASSESSMENT OF MUNICIPAL TAXES BY COUNTY TAX ASSESSORS—MUNICIPAL ELECTION AS TO INITIAL ASSESSMENT—CH. 69-54, LAWS OF FLORIDA(§ 167.433, F. S.)

To: *Robert A. Andreu, City Attorney, St. Augustine*

#### QUESTION:

Is it mandatory for the City of St. Augustine, which has the same fiscal year as St. Johns County, to have its taxes assessed and collected by the county in the year 1970?

Your question is answered in the affirmative, because of the explicit language of Ch. 69-54, Laws of Florida(§ 167.433, F. S.), applicable to municipalities which have the same fiscal year as the county in which they are located:

Section 1. The several county tax assessors shall assess all property for all municipalities located within their respective counties for the year 1969 or 1970, at the election of each municipality, and for each and every year thereafter; provided however, that in municipalities having a different fiscal year from that of the county, such first assessment shall be made either in the year 1969, 1970 or 1971, at the election of each municipality.

The primary provision states that county tax assessors shall assess all property for all municipalities "for the year 1969 or 1970, at the election of each municipality, and for each and every year thereafter" and is followed by the qualifying proviso that municipalities having a different fiscal year may elect to have "such first assessment" in 1969, 1970, or 1971. It is clear that the proviso would serve no purpose whatever if the first clause is construed to impose mandatory assessment only after 1970 and to vest in all municipalities the right to elect to reject such assessment in 1969 and 1970. Since the statute as a whole should not, under settled canons of construction, be interpreted in a fashion which would deprive any part of meaning or render it superfluous, I conclude that the first clause of Section 1 above-quoted imposes a requirement that county assessors shall make assessments for municipalities for the year 1969 or 1970 and for every year thereafter

and vests in municipalities only a right of election between 1969 or 1970 for the initial such assessment. The proviso following is thereby accorded the effect of qualifying the primary mandate in order to allow certain municipalities, those having fiscal years different from the county, a broader election, i.e., 1969, 1970, or 1971, for the initial assessment.

070-17—March 17, 1970

# DEPARTMENT OF TRANSPORTATION

## FLORIDA TURNPIKE—AUTHORITY TO GRANT EXEMPTIONS FROM PAYMENT OF TOLLS

To: *John Cashin, Acting Secretary, Department of Transportation,  
Tallahassee*

### QUESTION:

May the department of transportation honor a request for issuance of an honorary gold pass to the Florida Turnpike similar to those issued in the past in recognition of meritorious service?

I call your attention to § 340.121, F. S., which reads as follows:

**340.121 Payment of toll on toll facilities required; exemptions.**—No persons except employees of the agency operating the toll project when using the toll facility on official state business, state military personnel as defined in § 347.19 and persons exempt from toll payment by the authorizing resolution for bonds issued to finance the facility, shall be permitted to use any toll facility operated by the department without payment of tolls; and failure to pay the prescribed toll shall be considered a misdemeanor punishable as are other misdemeanors.

Reference is made therein to § 347.19, F. S., which reads as follows:

### **347.19 Militia and clergymen exempt from paying tolls.**

(1) Any person belonging to the military forces of the state going to or returning from any parade, encampment, drill, muster, or other military service or meeting which he may be required to attend, if he is in uniform, presents an order for duty, or such other proper identification to be prescribed by the adjutant general, and all persons driving automobiles or other vehicles belonging to the military department of the state used for transporting military personnel, stores and property, when properly identified shall, together with any such conveyance and military personnel and property of the state in his charge, be allowed to pass free through all toll gates and over all toll bridges and ferries in this state.

(2) Clergymen and preachers of the gospel shall be allowed to pass free over all toll bridges and ferries in this state.

(3) A copy of this section shall be posted at each toll bridge and on each ferry.

Section 5.02 of the Turnpike Trust Indenture provides as follows:

Section 5.02. *Classification of Tolls; Free Passage.* The Authority covenants that tolls will be classified in a reasonable

way to cover all traffic, so that the tolls will be uniform in application to all traffic falling within any reasonable class regardless of the status or character of any person, firm or corporation participating in the traffic, except by reason of the use of commutation or other tickets or privileges based upon frequency, volume, or time of such traffic; and that no free vehicular passage will be permitted over the Turnpike System, except to members, officers and employees of the Authority and law enforcement officers while in the discharge of their official duties in connection with the construction, operation and maintenance of the Turnpike System and State military personnel as defined in § 347.19, Florida Statutes.

Considering the aforementioned in *pari materia*, it is clear such passes anticipating free vehicular passage over the turnpike are excluded in the bond indenture, which exempts, however, members, officers and employees of the authority and law enforcement officers while in the discharge of their official duties in connection with the construction, operation, and maintenance of the turnpike system and state military personnel, as defined in § 347.19, F. S. Clergymen and preachers of the gospel are not exempt and not permitted free passage.

Your question is answered in the negative.

070-18—March 31, 1970

#### PUBLIC OFFICERS AND EMPLOYEES

#### NEPOTISM—APPLICATION OF § 116.111, F. S., ANTINEPOTISM STATUTE, TO EMPLOYMENT EXISTING ON EFFECTIVE DATE

To: Roland X. Droit, Supervisor of Elections, Sebring

#### QUESTION:

Does the antinepotism statute, Ch. 69-341, Laws of Florida (§ 116.111, F. S.), effective Jan. 1, 1970, require the discharge of persons employed at the effective date of the act when a prohibited relationship between the employee and the appointing officer comes into existence subsequent to that date?

A similar question was answered in the negative by this office in a communication to the governor and others under date of June 18, 1969. In *State ex rel. Robinson v. Keefe*, Fla. 1933, 149 So. 638, cited therein, the court said that the antinepotism statute should be construed in the light of its purpose to discourage "the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee." And in the case of a prohibited relationship that comes into existence some time *after* the original appointment was made, the antinepotism statute is clearly inapplicable insofar as the original appointment is concerned.

For example, a change in the identity of the appointing officer might result in a prohibited relationship between the new official and an existing employee; or a change in the marital status of the appointing officer, or of a relative of such officer, could effect a change in the relationship of an existing employee to the official. In these circumstances, since the *original* appointment was not based on a blood or marital relationship, the reason for the antinepotism rule ceases insofar

as the *employment* of such employee is concerned and should not be applied to require the discharge of such employee. Our statute prohibits the "promotion or advancement" of an employee by an official when the prohibited relationship exists; and it is this provision of the statute, rather than the "appointment" or "employment" provision, that is applicable when a prohibited relationship comes into existence subsequent to a valid appointment or employment.

Your question is, therefore, answered in the negative.

070-19—April 1, 1970

### GAMBLING

#### RACETRACKS AND JAI ALAI FRONTONS—SPLIT BETTING—CONSTRUCTION OF §§ 849.24 AND 849.25, F. S., AS TO WHAT CONSTITUTES BOOKMAKING

To: Joe H. Mount, Assistant City Attorney, Tampa

#### QUESTION:

If individuals attending a racetrack, dog track or jai alai fronton as a group select one of their members to place bets through the pari-mutuel machine on behalf of the group, or the individual members thereof, and no compensation is paid the individual purchasing the pari-mutuel tickets and he contributes his share of the collective costs of the tickets, is there a violation of the prohibition against "... betting on the grounds of a permit holder of a horse or dog track or jai alai fronton license other than through the legalized pari-mutuel pools...?"

Section 849.25, F. S., defines the term "bookmaking" as "... the taking or receiving of money, bet, or wager, upon the result of any trial or contest of skill, speed, power or endurance of man, beast, fowl or motor vehicle."

The answer to your inquiry revolves upon whether there is in fact a bet involved.

Although the term "bet" is not defined in § 849.24, F. S., a reasonable construction of that section leads to the conclusion that betting is the other facet of the transaction known and defined as bookmaking, viz., the placing of a bet or wager upon the result of any trial or contest of skill, speed, power or endurance of man, beast, fowl or motor vehicle.

A "bet" has been defined as: A hazard of money upon an incident by which one or both parties stand to win or lose by chance. *Long v. Merwin*, 99 Me. 486, 59 A 1021, *Commonwealth v. Sullivan*, 218 Mass. 281, 105 N.E. 895. The legal meaning of the term "bet" used in connection with gaming, is the mutual agreement and tender of a gift or something valuable, which is to belong to one of the contending parties according to the result of a trial of chance or skill. *Long v. State*, 22 Texas App. 194, 2 S.W. 541, 38 Am. Jur. 2d, Gambling, § 2, text 108.

From the facts submitted, it does not appear there is either a bookmaking or betting transaction involved. Hence, the prohibitions of §§ 849.24 and 849.25, F. S., are not violated.

These comments are strictly limited to the facts and circumstances submitted in your letter of inquiry. Under no circumstances should they be considered controlling in situations in which strangers to the group accept, on their own, bets or wagers of individuals in a group. This



discussion is limited solely to split betting within a group of persons attending a horse track, dog track or jai alai fronton who, through one of their members as an agent, place bets through the pari-mutuel machine.

070-20—April 2, 1970

# TAXATION

## ASSESSMENT OF RAILROAD PROPERTY FOR MUNICIPAL TAX PURPOSES—APPLICATION OF §§ 167.433 AND 195.01[§ 193.531], F. S.

To: Robert A. Andreu, City Attorney, St. Augustine

### QUESTION:

In the event the City of St. Augustine assesses and collects taxes in accordance with §§ 167.433-167.439, F. S., would the valuation of the railroad property be determined by the department of revenue or by local officials?

All railroad property described in § 193.531, F. S., is required to be assessed by the property assessment bureau of the state department of revenue. The statutory enumeration of properties to be centrally assessed appears to be inclusive, leaving for local assessment only lots which are leased or rented, and personal property not used or to be used in connection with the construction, operation, or maintenance of the property of the company. *Simpson v. Loftin*, 160 Fla. 20, 33 So.2d 230. The statute, § 195.01(3), (4), and (5)[§ 193.531(3),(4),(5)], F. S., requires the department to notify each county assessor of the proportionate value of operating railroad properties taxable in the county, but states, with reference to municipalities, that after notice of the apportionment of railroad property within a city, "the value thereof shall be assessed by such city or town as provided by law." (Emphasis supplied.)

The early decisions affirming valuation by municipalities of such railroad properties were based expressly upon the provision of Art. IX, § 5, State Const., 1885, that "the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits" and that "all property shall be taxed upon the principles established for State taxation." (Emphasis supplied.) *Tampa So. R. Co. v. City of Bradenton*, 122 Fla. 173, 165 So. 679; *Ellis v. A.C.L.*, 68 Fla. 160, 66 So. 1005.

Article VII, § 9 of the 1968 State Const. omits the constitutional mandate quoted above and, so far as here material, states only that "municipalities shall . . . be authorized by law to levy ad valorem taxes . . ." In implementation of the new constitution, Ch. 69-54, Laws of Florida, provided, in part:

Section 4. The county tax assessor . . . shall assess all property subject to taxation . . . located within a municipality within the county. . . .

Section 5. . . . [T]he assessor shall certify to each municipality within the county the total assessed valuations of all property located within that municipality. . . . (Emphasis supplied.)

Section 12. All taxes levied and assessed under the tax assessment rolls shall be due and payable at the same time . . . All shall be governed by the general laws relating to county taxes.

The prescription of § 195.01(5)[§ 193.351(5)], F. S., above-quoted, is that the value of railroad property shall be assessed by the city "as provided by law." I believe, from a detailed consideration of the decisions and constitutional provisions hereinabove noted, that the municipal valuation of such property by cities coming under Ch. 69-54, Laws of Florida, must be a valuation as provided by that law—i.e., a valuation by the county tax assessor. Since there appears to be no constitutional or statutory provision which would require or authorize independent municipal valuation of railroad property, I conclude that the valuation by the county assessor for municipal purposes should be the just value determined by the department under § 195.01[§ 193.531], F. S. This conclusion is consistent with the additional requirement of § 12, Ch. 69-54, Laws of Florida(§ 167.435, F. S.), that tax assessments and levies "shall be governed by the general laws relating to county taxes," apparently contemplating consolidation of the assessment rolls for all practical purposes.

Your question is answered by the conclusion that under Ch. 69-54, Laws of Florida, the assessed value of railroad property within the city should be that determined by the department of revenue, under § 195.01[§ 193.531], F. S.

070-21—April 3, 1970

#### AMENDMENTS TO CONSTITUTION

#### JOINT RESOLUTIONS PROPOSING AMENDMENTS—AUTHORITY OF LEGISLATURE TO RESCIND AT SUBSEQUENT SESSION OR TO RECALL

To: *Donald G. Nichols, State Representative, Jacksonville*

#### QUESTIONS:

1. May the 1970 legislature adopt a new joint resolution proposing a revision of Art. V of the State Const., and rescind the 1969 proposal for such revision, Senate Joint Resolution No. 36?

2. May Senate Joint Resolution No. 36 be recalled or withdrawn from the office of the secretary of state, reconsidered and amended by the 1970 legislature?

The question of whether the action of the legislature in proposing a constitutional amendment may be rescinded at a subsequent session does not appear to have been judicially determined in this state. It is settled, however, that the constitutional authority of each house of the legislature to determine its own rules of procedure includes authority to determine the rules of procedure to be observed in agreeing to proposed amendments to the State Const. See *Crawford v. Gilchrist*, 1912, 64 Fla. 41, 59 So. 963, 968, citing *United States v. Ballen*, 144 U.S. 1, 12 Sup. Ct. 507, 36 L.Ed. 321; *Opinion of the Justices, Ala. 1949*, 39 So.2d 665; *Opinion of the Justices, Ala. 1949*, 40 So.2d 623.

No formal rule providing for the rescission at a subsequent session of a resolution proposing an amendment to the State Const. has been adopted by either house of the legislature as of this writing. There is, however, significant precedent for such action. See *Rules and Manual of the Florida House of Representatives*, 1969-1970, p. 73, on the subject "Significant Precedents in the Florida House of Representatives." Thus, at its special session in 1962, the legislature adopted House Joint Resolution No. 30-X proposing a constitutional amendment relating to legislative apportionment and at the same time adopted Senate Joint

Resolution No. 18-X, which rescinded the resolution adopted during the 1961 regular session on the same subject (Senate Joint Resolution No. 216) and directed the secretary of state to withdraw Senate Joint Resolution No. 216 from the November 1962 general election ballot. Similar action was taken during the June-July 1968 special session, at which the resolutions proposing the revision of all of the 1885 State Const. except Art. V (SJR 4-2X, SJR 5-2X and HJR 1-2X) were adopted. See HJR 5-2X, SJR 6-2X and SJR 7-2X rescinding HJR 100-X(68), SJR 44-X(68) and SJR 52-X(68), respectively. The rescinding resolutions and the adoptive resolutions were filed in the office of the secretary of state on the same date—July 17, 1968. Needless to say, both the 1962 and 1968 rescinding resolutions were adopted prior to the date the proposals contained in the rescinded resolutions were to have been submitted to the electorate for approval or rejection—the general elections in November of 1962 and 1968.

It is settled parliamentary practice that, with some exceptions—such as when something has been done that the assembly cannot undo—a deliberative body may rescind at any time any action previously taken. See Robert, Rules of Order, Revised (75th Anniv. Ed. 1951), Rule 37; Robert, Parliamentary Practice (The Century Co.), p. 83. In view of this parliamentary practice and in the light of the “significant precedents” referred to above that might be said to have adopted, by custom and usage, the general parliamentary rule in this respect, it is my opinion that the first question should be answered in the affirmative. The vote to rescind should, of course, be agreed to by the same percentage of the membership as was required to take the action. See 37 C.J.S., Parliamentary Law, Section 5(c), p. 874; *Stockdale v. School District No. 2*, Mich. 1881, 10 N.W. 349.

The general parliamentary usage respecting reconsideration of the vote by which a question has been adopted limits the motion to the day or the day after the vote which it is proposed to reconsider was taken. See Robert, Parliamentary Practice, p. 80. Senate Rule 6.5 (Senate Rules and Manual, 1968-1970) contains the same limitation. In *Crawford v. Gilchrist*, *supra*, 59 So. 963, in which the right to reconsider a joint resolution proposing a constitutional amendment was upheld, the motion to reconsider was made on the day following its passage by the senate and certification to the House. And in *State v. Butler*, Fla. 1915, 69 So. 771, it was stated that:

When not otherwise provided by law, all deliberative bodies have a right *during the session* to reconsider action taken as they deem proper, and it is the final result only that is to be regarded as the thing done. (Emphasis supplied.)

Even assuming that the legislature could validly provide by rule, under Art. III, § 4, State Const., for the reconsideration and amendment of a joint resolution proposing a constitutional amendment adopted *at a previous session*, as to which no opinion is expressed, it has not done so; and in the absence, then, of any rule, usage or precedent upon which a motion to reconsider action taken at a previous session could be based, the second question is answered in the negative.

070-22—April 3, 1970

## MIGRANT FARM WORKERS

CONSTRUCTION OF § 317.9931(1), F. S., DEFINING  
MIGRANT FARM WORKERS AS IT RELATES TO  
EXEMPTIONS FROM DRIVER'S LICENSE AND  
MOTOR VEHICLE LICENSE PLATE REQUIRE-  
MENTS—§ § 320.38 AND 322.04, F. S.

To: Tommy Stevens, State Representative, Dade City

## QUESTION:

Do the licensing exemptions granted nonresident migrant farm workers under Chs. 69-186 and 69-156, Laws of Florida (§ § 322.04 and 320.38, F. S.), apply to commercial type trucks used regularly to haul citrus and agricultural products from a grove or farm to a processing plant?

Chapter 69-186, Laws of Florida, amends § 322.04, F. S., pertaining to persons exempt from obtaining driver's licenses, by the addition of the following italicized portions in subsection (2), as follows:

The provisions of this section shall not apply to any nonresident, *except nonresident migrant farm workers as defined in § 317.9931(1)*, who shall accept employment or enter his children to be educated in the public schools of this state, or a child of such nonresident who is at least sixteen years of age, but in such case or cases such nonresident, *except nonresident migrant farm workers as heretofore defined*, or child of the nonresident shall be required to obtain a driver's license in the same manner as is required of residents of the state before such nonresidents or children shall be permitted to operate any motor vehicle on the highways of the state. (Emphasis supplied.)

This section, prior to its amendment by Chapter 69-186, Laws of Florida, removed a nonresident or his child from the exemptions in subsection (1) through (4) when there was employment or the child entered in a public school. However, this section as amended does not remove a nonresident migrant farm worker as defined in § 317.9931(1), F. S., or his child from the exemption of obtaining a driver's license when he is employed in planting, cultivating or harvesting agricultural crops.

Section 320.38, F. S., pertaining to the loss of nonresident exemption in the purchase of a Florida automobile license plate, was amended by Ch. 69-156, Laws of Florida, as follows by the addition of the italicized portions:

(1) The provisions of law authorizing the operation of motor vehicles over the highways of the state by nonresidents of this state, when such vehicles are duly registered or licensed under the laws of some other state or foreign country, shall not apply to any nonresident who accepts employment, or engages in any trade, profession or occupation in this state, *except a nonresident migrant farm worker as defined in § 317.9931(1)*. In every case where a nonresident, *except a nonresident migrant farm worker as defined in § 317.9931(1)*, accepts employment or engages in any trade, profession, or occupation in the state or enters his children to be educated in the public schools of the state, such nonresidents shall, within ten days after the



commencement of such employment or education, be required to register his motor vehicles in this state if such motor vehicles are proposed to be operated on the highways of the state. (Emphasis supplied.)

This section, removing nonresidents from the exemption as a result of purchasing motor vehicle license plates for the operation of motor vehicles upon the highways of Florida when the nonresident accepts employment or enters his children in the public schools, does not apply to nonresident migrant farm workers as defined in § 317.9931(1), F. S.

"Migrant farm workers," as defined in § 317.9931(1), F. S., means "persons employed in the planting, cultivation, or harvesting of agricultural crops who are not indigenous to or domiciled in the locale where so employed."

A nonresident migrant farm worker does not lose his exemption from the purchase of a Florida driver's license or motor vehicle registration under the above amended statutes when he accepts employment in the planting, cultivating or harvesting of agricultural crops. This exemption applies to any type motor vehicle, be it passenger car, station wagon, or truck, that is used by the nonresident migrant farm worker or members of his family as a means of transportation.

Your question is based upon a determination as to whether or not employment for the hauling of citrus and farm products from the grove and field to a processing plant is a part of "harvesting" under the definition of § 317.9931(1), F. S., which would entitle a nonresident farm worker to license and registration exemptions for himself and his commercial truck. I think not.

"Harvesting" is the gathering of crops of any kind. See *Cook v. Massey*, 220 P. 1088 and 39 C.J.S. 779. "Harvesting," as used in the definition of § 317.9931(1), F. S., appears to be confined to that type of farm work performed in the planting, cultivating, and gathering of crops on the farm and was never intended to exempt trucks and drivers engaged in the trucking business. "Harvesting" as used in said section, includes all farm work that is customarily performed in a field or on a farm in connection with the gathering of crops from their growing position in the field.

In determining the question of whether the transportation of products from the fields of independent growers to processing plants was considered as "harvesting" under the definition of "agriculture" in § 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C.A. § 203(f)), the court, in *Wirtz v. Osceola Farms Co.*, (C.A. Fla.) 372 F.2d 584, held that drivers of semitrailer tractor trucks hauling sugarcane from fields of independent growers to sugarcane mill of employer were not engaged in "harvesting" and therefore not exempt from the Fair Labor Standards Act minimum wage and overtime provisions. The court further stated, at p. 588:

Transportation of fruit from farms of independent growers by employees of a fruit company was held not harvesting in *Chapman v. Durkin*, 214 F.2d 360 (5th Cir. 1954) cert. denied 348 U.S. 897, 75 S.Ct. 218, 99 L.Ed 704 and *Fort Mason's Fruit Co. v. Durkin*, 214 F.2d 363 (5th Cir. 1954) cert. denied, 348 U.S. 897, 75 S.Ct. 218, 99 L.Ed 705.

It is, therefore, my opinion that §§ 322.04 and 320.38, F. S., as amended, exempts nonresident farm workers from obtaining Florida driver's licenses and having their motor vehicles registered, regardless of the type they may possess, when they are employed to do farm work on a farm. However, the use of motor vehicles, regardless of the type,

over the highways of Florida to haul farm and citrus products to processing plants is without the exemptions of §§ 322.04 and 320.38, and both the vehicle and operator must be properly licensed in Florida.

070-23—April 6, 1970

# STATE AND COUNTY OFFICERS

## SUSPENSION, GOVERNOR'S AUTHORITY PURSUANT TO ART. IV, § 7, STATE CONST.—PROSECUTION BEFORE SENATE

To: *Federick B. Karl, State Senator, Chairman, Select Committee on Suspensions, Tallahassee*

### QUESTION:

What grounds and allegations must a valid executive order of suspension contain?

Article IV, § 7 of the State Const., provides for the power and the authority of the governor to make suspensions. I place particular emphasis upon subsection (a) thereof as follows:

(a) By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor.

Please note that the officers named in the State Constitution may be suspended for, *and only for*, malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform their official duties, or commission of a felony.

As I read the executive order, I find none of these conditions alleged; quite the contrary, I find that the officers allegedly suspended are commended by the governor's order for the performance of their duties. In view of the longstanding law of the state, the many cases that have been decided by the Supreme Court and, lastly, Ch. 69-277, Laws of Florida (§§ 112.40-112.48, F. S.), in order for the governor to suspend an officer, it is necessary that the facts must be stated with particularity and be susceptible to proof in accordance with the mandate of the State Const. Again, I say that I find none of these basic legal requirements in the order of suspension.

It thus appears, that the order of suspension of the named individuals issued on the 5th of April, 1970 is ineffective to constitute the suspension of these officials. Therefore, pursuant to Ch. 69-277, Laws of Florida (§§ 112.40-112.48, F. S.), under which you have asked my advice, I do not believe there is anything in this order upon which the senate may act since there has been no valid suspension order.

070-24—April 14, 1970

## TAXATION

OBLIGATION TO PAY TAXES ASSESSED ON PROPERTY  
DESTROYED SUBSEQUENT TO JANUARY 1*To: Ralph B. Wilson, County Attorney, Fort Pierce*

## QUESTIONS:

1. Is the owner of certain taxable tangible personal property assessed on the 1969 tax roll obligated to pay the assessed tax when said property was completely destroyed by fire in February, 1969?

2. Is there any way for the tax assessor, tax collector or comptroller to cancel this assessment and bill?

Your first question is answered in the affirmative. Section 192.04[§ 192.021], F. S., states that:

All real and personal property shall be subject to taxation on the first day of January of each year, and shall be a lien upon such property for the purposes thereof superior to all others . . . .

Section 193.11(1)[§ 193.071(1)], F. S., states that:

Between January 1 and July 1 in each year, the county assessor of taxes in each county . . . shall ascertain . . . the names of all taxable persons in his county, and also all of their taxable personal property . . . therein, as of January 1 of such year, and shall make out an assessment roll of all such taxable property. . . .

In *Overstreet v. Ty-Tan, Inc.*, 48 So.2d 158 (Fla. 1950), the court held that:

... [Since] sections 192.04 and 193.11, F.S.A. fix the date on which ad valorem taxes must be assessed "as of" January first, each year, . . . there was no authority for imposing ad valorem taxes on appellee's property it having been acquired and brought into the county after January 1, 1948.

Section 200.021(1)[§ 193.034(1)], F. S., states that:

All taxable tangible personal property . . . located in the state between January 1 and March 31 of each year . . . shall be taxable for said year in the county and by the tax assessor of the county in which the same is located; provided, that tangible personal property brought into the state after January 1st and before April 1st of any year shall be taxable for that year only if such property is brought into the state for resale or if the assessor has reason to believe that such property will be removed from the state prior to January 1st of the next succeeding year.

It has been recognized that this section was enacted due to the *Overstreet* decision, and the latter parts appear to limit its operation primarily to property brought into the state for resale and property the assessor feels will be removed from the state prior to the following January 1. See AGO 061-87, May 24, 1961, Biennial Report of the Attorney General, 1961-1962, p. 140. This opinion also holds that the status of personal property on January 1 determines its taxable status.

In addition, § 200.021(2)[§ 193.034(2)], F. S., states that:

All taxable tangible personal property which is removed from one county in this state to another county after January 1 of any year shall be subject to taxation for said year in the county where it was located on January 1 . . . .

The foregoing is persuasive authority that the taxable status of personal property is ascertained as of January 1, subject only to those exceptions previously noted. See also, *Caruthers v. Curcie Brothers, Inc.*, 195 So.2d 545 and *St. Joe Paper Co. v. Ray*, 172 So.2d 646.

Events subsequent to January 1 affecting the property, such as removal to another county or state, sale, lease, consumption or destruction, appear to be immaterial with respect to the obligation to pay the tax.

Section 192.01[§ 192.011], F. S., states that: "Unless expressly exempted from taxation, all . . . personal property in this state . . . shall be subject to taxation . . . ."

Section 192.06[§ 196.191], F. S., which enumerates property exempt from taxation, does not mention destroyed property. Therefore, such property is not exempt.

Your second question is answered in the negative. Section 192.21[§ 197.011], F. S., states:

. . . No act of omission or commission on the part of any tax assessor . . . tax collector, board of county commissioners, clerk of the circuit court, [or] officer of this state . . . shall operate to defeat the payment of said taxes . . . .

In consideration of the foregoing, I am of the opinion that if taxable tangible property is in existence on January 1, it is taxable regardless of when it was subsequently destroyed, and that no one has the authority to cancel the owner's obligation to pay the tax.

070-26—April 14, 1970

## TAXATION

### PROPERTY TAX EXEMPTION FOR THE BLIND OR TOTALLY DISABLED—AMOUNT

To: *Harold M. Wayne, Tax Assessor, St. Augustine*

#### QUESTIONS:

1. If application is made by a taxpayer (not a veteran) for disability exemption, which application is accompanied by a letter from a physician stating that the applicant is either blind or otherwise totally disabled, shall an exemption be granted, and in what amount?

2. If exemption is to be granted under question 1, are we to assume that the prior Opinions of Attorney General (including, but not limited to 055-87) relating to the degenerative processes of life, are to be considered no longer effective?

The controlling constitutional provision, Art. VII, § 3(b), State Const., now states:

There shall be exempt from taxation . . . to every . . . person who is *blind or totally and permanently disabled*, property to the *value fixed by general law* not less than five hundred dollars. (Emphasis supplied.)



As indicated in opinion 069-133, of this publication, § 192.06(7)[§ 196.191(7)], F. S., is among the statutes preserved by Art. XII, § 6, of the State Const., "... to the extent not inconsistent with it . . . . That statute provides, in pertinent part:

196.191 Property exempt from taxation.—The following property shall be exempt from taxation:

\* \* \* \* \*

(7) Property to the value of five hundred dollars . . . to every person who . . . has . . . *been disabled* in war or military hostilities or by *misfortune*. (Emphasis supplied.)

Art. VII, § 3(b), State Const., clearly accomplishes an exemption of property to a value not less than five hundred dollars to every blind or totally and permanently disabled person. The terms "blind or totally and permanently disabled" would of course be subject to legislative or administrative definition consistent with the constitutional mandate. See AGO 069-132, of this publication. The constitutional language accordingly compels a minimum exemption for property of totally and permanently disabled persons, among others. It permits an increase in this amount by general law, and by another provision also permits certain "use" exemptions upon legislative implementation.

Article VII, § 3(b), State Const., therefore requires that your first question be answered affirmatively insofar as it pertains to an exemption of property to the value of \$500.00 to be granted to an applicant who is in fact either blind or *totally and permanently disabled*. Section 192.06(7)[§ 196.191(7)], F. S., may be regarded as a consistent legislative act which restates the constitutional minimum exemption as to those who have been disabled by misfortune, but a consideration of both its language and status as a law incorporating terms of the former constitutional exemption, Art. IX, § 9, State Const., does not permit its application to limit exemption under Art. VII, § 3(b), State Const., to those named in the statute. The statute does not in terms state that exemption shall be limited to those disabled by misfortune and an exclusionary construction cannot be given such a statute under the circumstances.

Article VII, § 3(b), State Const., exempts to the value of \$500.00 property of all totally and permanently disabled persons without regard to the cause of such disability by misfortune or otherwise. Opinions of this office, such as AGO 055-87, Apr. 26, 1955, Biennial Report of the Attorney General, 1955-1956, p. 118, defining "misfortune" under the former constitutional provision are therefore inapplicable, and question 2 is answered accordingly.

Your inquiry with reference to *proof* of disability included within the first question presented has been answered on numerous occasions by reference to your duty to determine as a matter of fact that constitutional or statutory requirements for exemption have been met. In the absence of provision by law, the method of proof, by physician's certificate or otherwise, remains a matter for your determination. The absence of legislative or judicial guidelines for the determination of what constitutes total and permanent disability for these purposes also leaves that issue one of fact for your determination not subject at this time to a fixed or definite rule. Cf. AGO 054-95, Apr. 20, 1954, Biennial Report of the Attorney General, 1953-1954, p. 308.

070-27—April 14, 1970

### TAXATION

#### HOMESTEAD EXEMPTION, ART. X, § 4 STATE CONST.—INCORPORATION— EFFECT UPON ACREAGE SUBJECT TO EXEMPTION

To: William R. Slay, Tax Assessor, Bonifay

#### QUESTION:

Is the area of a homestead, upon which homestead tax exemption has been granted, reduced in area upon its being incorporated into a municipality?

Your question is answered in the negative.

Article X, § 4(a)(1), State Const., states that:

[A] homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon . . . shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality . . . .

The substance of this provision is contained in Art. X, §§ 1 and 5, State Const. of 1885.

Since the substance of the State Const. of 1885, in respect to this matter, was not changed by the 1968 State Const., the court decisions and rulings of the Attorney General based on the 1885 State Const., are still applicable and govern interpretation of the 1968 constitutional provisions.

Section 192.12[§ 196.031], F. S., which defines a homestead and provides to what extent it is exempt from taxation is based on Art. X, § 7 of the 1885 State Const., and in substance is contained in the 1968 State Const. in Art. VII, § 6. This statute is carried forward by virtue of Art. XII, § 6, of the 1968 State Const., which provides for the preservation of laws not inconsistent with the 1968 State Const.

It has been held that inclusion into an incorporated municipality does not effect a reduction of the homestead acreage previously allowed. Attorney General's Opinion 057-6, Jan. 7, 1957, Biennial Report of the Attorney General 1957-1958, p. 5; *Morgan v. Bailey*, 105 So. 143; *Crocker v. Crocker*, 7 F.2d 218 and *Manda v. Sinclair*, 278 F.2d 629.

The facts in the *Morgan* and *Manda* cases appear to be that there was an existing homestead which was in an area subsequently incorporated. The courts held that the homestead acreage was not reduced. In *Crocker* the court went even further and held that not only did the inclusion of part of the homestead in the incorporated city not reduce the homestead, but that additional contiguous land could be later added to the homestead, and it would all qualify for homestead exemption provided it did not exceed the one hundred sixty acre limitation.

The factual situation presented here appears to be almost identical to the *Morgan* and *Manda* cases. Therefore, in consideration of the foregoing, I am of the opinion that to no extent is the area of a homestead reduced by its subsequent incorporation into a municipality absent the consent of the owner thereof.

070-28—April 14, 1970

## TAXATION

## HOMESTEAD EXEMPTION—UNRESTORED CIVIL RIGHTS

To: *Gaylord Wood, Jr., General Counsel, Broward County Tax Assessor, Fort Lauderdale*

## QUESTION:

May a person who has not been restored to the civil rights he was deprived of as a result of a felony conviction, sometime in his past, qualify for homestead exemption?

Article VII, § 6(a) of the State Const., states:

*Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon . . . up to . . . five thousand dollars . . . . (Emphasis supplied.)*

Attorney General's Opinion 046-196, May 10, 1946, Biennial Report of the Attorney General, 1945-1946, p. 285, holds that citizenship is not a requirement for homestead tax exemption. Also, registration for voting purposes was held not to be a prerequisite to obtaining homestead exemption in AGO 053-68, March 24, 1953, Biennial Report of the Attorney General, 1953-1954, p. 69. These opinions illustrate that although loss of suffrage is one consequence of a felony conviction, the person so convicted is not thereby deprived of his right to obtain homestead exemption.

Neither § 192.12[§ 196.031], F. S., nor the constitutional provision previously quoted requires citizenship to obtain homestead exemption.

In AGO O-10, Jan. 19, 1939, Biennial Report of the Attorney General, 1939-1940 p. 438, it was held that minors, aliens, and any other person who held the legal or beneficial title in equity to real property in this state were entitled to homestead exemption and that citizenship was not the test. In *Smith v. Voight*, 28 So.2d 426 (Fla. 1946) it was held that not even United States citizenship was required in order to obtain homestead exemption.

It is generally recognized that the rights forfeited upon conviction of a felony are suffrage and the right to hold office, serve on a jury, and be a witness. *Page v. Watson*, 192 So. 205 (Fla. 1938); *Marsh v. Garwood*, 65 So.2d 15 (Fla. 1953).

In view of the foregoing authority and the fact that I have been unable to find any authority to the contrary, your question is answered in the affirmative.

070-29—April 16, 1970

## DIVISION OF PARI-MUTUEL WAGERING

DOG RACING—POWER OF DIVISION TO FIX OPERATIONAL  
DATES—COUNTIES HAVING MORE THAN ONE TRACK,  
ADJOINING COUNTIES

To: *Carey Matthews, State Representative, Miami*

## QUESTION:

May the division of pari-mutuel wagering fix and apportion operational dates for dog tracks in a county having more than one dog track, without at the same time fixing and including in such order the operational dates of a dog track in an adjoining county?

I find nothing in Ch. 550, F. S., that can be interpreted as making it the mandatory duty of the division to include in an order apportioning dog racing dates in a multiple-track county the racing days and dates granted or proposed to be granted to a dog track in an adjoining county.

The "apportionment" requirements of § 550.02(1), F. S., have been interpreted as requiring the coordination of dog racing days and dates only among the several dog tracks within a single county. See *State ex rel. Broward County Kennel Club v. Rose*, Fla. 1936, 170 So. 710; cf. *State ex rel. West Flagler Amusement Co. v. Rose*, Fla. 1935, 165 So. 60; *State ex rel. West Flagler Kennel Club v. Florida State Racing Commission*, Fla. 1954, 74 So.2d 691. It has also been said that the legislature "fixed the county as a unit for the regulation" of dog racing so that the commission could not impose a rule that materially restricted the operation of a dog track in a single-track county. See *St. Petersburg Kennel Club v. Baldwin*, Fla. 1949, 38 So.2d 436.

By virtue of various amendatory statutes and an opinion of one of my predecessors in office, the division may now set the racing days and dates of dog tracks in counties in which there is only one dog track as well as in counties in which there are more than one dog track. See AGO dated July 29, 1937, Biennial Report of the Attorney General, 1937-1938, § 550.291, F. S. (Ch. 65-435, Laws of Florida); § 550.083, F. S. (Ch. 61-509, Laws of Florida). There is no doubt that the division—in the exercise of its duty and responsibility in awarding racing dates to "look to the interest of the state, which receives revenue for the operation of the track," *State ex rel. West Flagler Kennel Club v. Florida State Racing Commission*, Fla. 1954, 74 So.2d 691—may take into consideration the days and dates set or proposed to be set for dog racing in a multiple-track county when fixing those in a single-track county, or vice versa, when the distance between them is such as to generate a competitive situation. But, as noted above, the statute in terms provides for and contemplates the fixing and setting of dog racing days and dates on a county-unit basis; and a legislative intent to require the division to apportion and allocate racing days and dates among dog tracks in adjoining counties in a single order should be expressed by the legislature itself in an act declaratory of such intent, rather than being read into the act by administrative or judicial interpretation.

The decision of the Supreme Court in *State ex rel. Investment Corp. of South Florida v. Board of Business Regulation*, Fla. 1969, 227 So.2d 674 does not require a different conclusion. In that case, the division of pari-mutuel wagering (formerly the state racing commission) had included in its order apportioning racing days and dates in a multiple-track county (Dade) the dates and days of racing awarded to the Hollywood Kennel Club in adjoining Broward County. Two of the Dade County tracks appealed to the department of business regulation for a review of such order without joining the Hollywood Kennel Club as a party appellee; and the application of Hollywood to be heard on the appeal was denied by the department. In holding that the department's order on the appeal was void for failure to join an indispensable party, the court said: "Hollywood Kennel Club, having acquired valuable property rights under the orders by the State Racing Commission of August 14, 1969, which rights were directly threatened in the appeal was an indispensable party to the appeal." (Emphasis supplied.) The court did not comment on the contention made in brief by the department that Hollywood had no right to have its days and dates fixed and awarded in conjunction with the multiple-track awards in Dade County so that, not being an indispensable party to the commission's order respecting the Dade County tracks, Hollywood was not an



indispensable party to the *appeal* by such tracks from such order. By grounding its decision on the rights acquired by Hollywood under the order, the court left unresolved the question here presented by you.

In sum, under the terms of the statute as presently written, and in the absence of any judicial determination to the contrary, your question is answered in the affirmative.

070-30—April 22, 1970

### ELECTRONIC DATA PROCESSING

#### PHASE I OF CONSOLIDATION PLAN—AUTHORITY FOR PARTICIPATION BY STATE AGENCIES

To: *Chester F. Blakemore, Executive Director, Department of General Services, Tallahassee*

#### QUESTIONS:

1. Do §§ 339.08 and 339.09, F. S., or any other provisions of the Florida highway code, prevent full compliance with, and participation in, the phase I electronic data processing consolidation plan adopted by the department of general services as of Sept. 16, 1969?

2. Was the action taken by the governor and cabinet in approving such plan, as proposed by the division of electronic data processing, department of general services, authorized and permitted by Part II, Ch. 23, F. S.?

3. Are all state agencies, including the department of transportation, authorized by Part II, Ch. 23, F. S., to participate in the consolidation program, absent any violation of federal law or regulations regarding the use of federal funds?

By action taken Sept. 16, 1969, by the governor and cabinet, as head of the department of general services, phase I of the electronic data processing consolidation program was implemented pursuant to Part II, Ch. 23, F. S., and § 22(4), Ch. 69-106, Laws of Florida (§ 20.22(4), F. S.). Phase I of this plan established several data processing centers for consolidated use by state agencies and assigned management and supervision thereof to various agencies under the general supervision of the division of electronic data processing, department of general services, as provided by the above-cited statute.

Based upon the authority of Part II, Ch. 23, F. S., it is necessary for the division of electronic data processing to obtain relevant information relating to the utilization of existing facilities. All state agencies are required by law to provide the necessary information and cooperation for this purpose. It is my understanding that the computer consolidation plan now being implemented does not call for a transfer or conveyance of any property, real or personal, owned by any of the state agencies involved. It is also my understanding that there is nothing in the plan adopted by the governor and cabinet which would require the use of gas tax revenues for purposes other than those authorized by §§ 339.08 and 339.09, F. S.

Therefore, question 1 should be answered in the negative. Of course, since the department of transportation pays its administrative costs, including data processing costs, from state funds earmarked for highway purposes, and since such funds may not be diverted for other governmental purposes, it is expected that the department of transportation would be fully reimbursed for costs of utilization of data processing hardware, etc., owned or leased by said department and used by other

state agencies under phase I of the electronic data processing consolidation plan.

Part II, Ch. 23, F. S., and Ch. 69-106, Laws of Florida, appear clearly to authorize the action taken by the governor and the cabinet, sitting as the department of general services, in approving the type of plan submitted on Sept. 16, 1969. Therefore, question 2 is answered in the affirmative.

Based upon the authority cited above, question 3 is also answered in the affirmative. Nowhere in Part II, Ch. 23, F. S., nor in phase I of the electronic data processing plan is there any intent to use gas tax funds for other than highway purposes as prohibited by Ch. 339, F. S. Quite the contrary, the plan in question proposes to compensate fully the department of transportation for any utilization of computer facilities owned or leased by said department. The plan merely proposes that surplus computer time be made available to other state agencies.

070-31—April 22, 1970

### JUDGMENT LIENS

#### CERTIFICATION AND RECORDATION OF JUDGMENTS AND DECREES—STATE AND FEDERAL

To: *Thomas H. Warlick, County Attorney, Orlando*

#### QUESTIONS:

1. Does the mere certification of the clerk of the circuit court placed upon the photocopy to be filed in the official records book as a matter of course meet the requirements of § 28.221(4), F. S.?

2. If question 1 is answered in the affirmative, what is the effect of this upon the rule of *Rhea v. Smith*, 274 U.S. 434, which requires that the laws relating to the registration, recording, docketing and indexing of judgments of the U. S. District Courts for the purpose of making them liens upon lands in the state conform to the provisions of the state law upon the same subject in reference to liens of judgments of the courts of record of this state?

I infer from your letter and your first question, as phrased, that Orange County has adopted the alternative Official Records system of recordation under § 28.221, F. S., and that the clerk of the circuit court presently files a copy of a judgment or decree "as a matter of course" in the official records of Orange County. You do not state whether he records them also in the minute book of judicial proceedings pursuant to § 28.21(1) and 28.29, F. S.

It is well settled in this state that a judgment or decree is "rendered" only when it is entered or recorded in the minute books of the circuit court (the Chancery Order Book, when acting in the exercise of its equity jurisdiction). *Magnant v. Peacock*, Fla. 1945, 24 So.2d 314, 315; *Dade Federal Savings & Loan Association v. Miami Title & Abstract Div.*, Fla.App. 1969, 217 So.2d 873, 878. And in AGO 056-53, Feb. 27, 1956, Biennial Report of the Attorney General, 1955-1956, p. 519, it was noted that the statutory provisions prescribing the procedure to be followed in acquiring and perfecting a judgment lien on a money judgment or decree have no connection with, and do not relieve the clerk of the duty of keeping, the "MINUTE BOOKS, in which he shall keep regular and fair minutes of all the proceedings of the circuit court..." (§ 28.21(1), F. S.), and in which "every order of dismissal, final judgment and final decree shall be recorded." § 28.29, F. S.

At common law, except for debts due the King, the lands of a judgment debtor were not liable to the satisfaction of a money judgment against him; and it is only by virtue of statute that such judgment liens may be acquired and perfected. *Protective Holding Corporations v. Cornwall*, Fla. 1936, 173 So. 804, 812. As pointed out in AGO 051-84, Apr. 6, 1951, Biennial Report of the Attorney General, 1951-1952, p. 40, the statutory procedure prescribed in this state for acquiring and perfecting a judgment lien, § 28.21(11), F. S., requires the circuit court clerk to record in the judgment lien book only those "certified transcripts of judgments and decrees... which may be presented for such record. (Emphasis supplied.) The use of the official records system of recordation authorized by § 28.221(4), F. S., does not change the duty of the circuit court clerk in this respect. As noted in AGO 056-53, unless the clerk is directed to do so by the judgment creditor or his attorney, he has no obligation to record a certified transcript or copy of such judgment in the official records book. And in AGO 060-186, Nov. 16, 1960, Biennial Report of the Attorney General, 1959-1960, p. 740, it was reaffirmed that "This matter is within the control of the judgment creditor or his attorney, whose duty it is to direct you to see that a certified copy of the judgment is appropriately recorded." The substantive law which was construed in the opinions of this office referred to above has not changed since they were rendered. See *Dade Federal Savings & Loan Association v. Miami Title & Abstract Div.*, Fla.App. 1969, 217 So.2d 873. Accord: AGO 067-81, Dec. 5, 1967, Biennial Report of the Attorney General, 1967-1968, p. 142.

You are advised, therefore, that all judgments or decrees, including money judgments or decrees, should be entered in the clerk's minute books of judicial proceedings; and thereafter, upon the request of the judgment creditor or his attorney, a certified transcript or copy thereof should be recorded in the official records books.

Question 2 apparently stems from a fear that the procedure followed by the circuit court clerk in Orange County in perfecting judgment liens of the circuit court of that county would run afoul of the Supreme Court's decision in *Rhea v. Smith*, 1926, 274 U.S. 434. In that case it was held that the federal statute conforming federal court judgment liens to state court judgment liens was intended to change the rule that federal court judgments were a lien upon lands of the judgment debtor throughout the territorial jurisdictions of the respective federal courts, but that it "intended to do this only in those states which passed laws making the conditions of creation, scope and territorial application of the liens of Federal court judgments the same as state court judgments..." Section 28.21(11), F. S., expressly includes both federal and state courts in prescribing the procedure to be followed in acquiring and perfecting judgment liens; and, as noted above, the procedure therein prescribed is applicable to counties adopting the official records system of recordation authorized by § 28.221. Nor has this procedure been changed by the amendment to § 55.10, F. S., by Ch. 67-254, Laws of Florida. See the *Dade Federal case*, *supra*, 217 So.2d p. 878. It is assumed that the Orange County circuit court clerk will conform his recordation procedure to the requirements of the statutes referred to above, as clarified in the *Dade Federal case*, *supra*, and in the opinions of this office referred to above. This being so, there will be no inequality in the statutory procedure for acquiring and perfecting judgment liens as between federal courts and state courts, so that the rule of the *Rhea* case will not apply.

070-32—April 23, 1970

## ELECTION CODE

SPECIAL ELECTIONS CALLED BY EXECUTIVE ORDER  
TO FILL LEGISLATIVE VACANCIES—  
PRIMARY AND GENERAL

To: *R. H. Walker, Chairman, Hillsborough County Election Board,  
Tampa*

## QUESTION:

Must a special election to fill the senatorial vacancy in District 24, Hillsborough County, be held on May 5, 1970, when on the same date a second special primary election to select a nominee to the Florida house of representatives, District 64, Hillsborough, Citrus, Pasco and Hernando Counties will also be held?

Your question is answered in the affirmative.

The Honorable Claude R. Kirk, Jr., Governor, called for a special election to fill an existing vacancy in the Florida Senate, District 24, Hillsborough County, by executive order issued March 31, 1970. That order directed that a special primary election be held on April 21, 1970, with a second special primary election on May 5, 1970, "if necessary." The order further stated "if it is not necessary to hold the second special primary election on May 5, 1970, the general [sic] election will be held on that date."

A second special primary election for the senatorial vacancy is unnecessary since one candidate received more than 50 percent of the votes cast in the first special primary election. The executive order, under such circumstances, directs that the special election to fill the senatorial vacancy be held on May 5, 1970.

The executive order pertaining to the election to fill the vacancy in District 64, Florida House of Representatives, and the general election laws and special laws applicable to this election do not contravene the gubernatorial mandate that the special election to fill the senatorial vacancy in District 24, Hillsborough County be held on May 5, 1970.

The senatorial vacancy in District 24, Hillsborough County, should be filled as quickly, as possible to provide the citizens of that district full and complete representation in the 1970 Legislature. Compliance with the mandate of the gubernatorial executive order that the special election to fill the senatorial vacancy be held on May 5, 1970, will accomplish that result.

070-33—April 23, 1970

## WATER AND SEWER TAX \*

COLLECTION PURSUANT TO CH. 367, F. S., DUTIES  
OF DEPARTMENT OF REVENUE—DEPOSIT OF  
TAX PAYMENTS

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

## QUESTIONS:

1. Does the Department of Revenue now have the responsibility to collect the water and sewer tax and penalties under Ch. 367, F. S.?



2. If question 1 is answered in the affirmative, are such funds placed in the general revenue fund or in the Florida public service regulatory trust fund as established under the provisions of Ch. 350, F. S.?

Section 367.19, F. S. 1967, imposed a public utility gross receipts tax and provided that, upon failure to remit, "the comptroller . . . shall proceed to collect such tax . . . in the same manner as other delinquent taxes are collected . . . . All such tax payments and penalties shall be placed in the general revenue fund." This section was amended by Ch. 69-164, Laws of Florida, effective June 25, 1969, to provide that the Florida public service commission "shall proceed to collect such tax . . . in the same manner as other delinquent taxes are collected . . . . All such tax payments and penalties shall be placed in the Florida public service regulatory trust fund as established under the provisions of chapter 350 [Florida Statutes]."

Section 21(3) of Ch. 69-106, Laws of Florida (§ 20.21(3), F. S.), effective July 1, 1969, transferred to the department of revenue "All powers, duties and functions of the comptroller relative to the collection of all state revenues presently required or authorized to be collected pursuant to . . . chapter 367, Florida Statutes . . . ." Chapter 69-106, Laws of Florida, also provided, in § 35 (§ 20.33, F. S.):

*Conflicts provision—All statutory law which names units of organization in the various agencies of the executive branch in a manner in conflict with the nomenclature used herein are amended so as to be consistent with the nomenclature used in this act. If any agency, program, activity or function transferred herein is changed in name or substance by another act of the legislature during the 1969 session, the agency, program, activity or function, as amended, is transferred in a manner consistent with the intent expressed by this act. (Emphasis supplied.)*

Section 35 of Ch. 69-106, Laws of Florida (§ 20.33, F. S.), requires that the act be construed to effect a transfer of the tax collection function and related activity under § 367.19, F. S., to the department of revenue, and your first question is accordingly answered in the affirmative. Although Ch. 69-164, Laws of Florida, was passed and became a law on June 25, 1969, subsequent to the date on which Ch. 69-106 was filed in the office of the secretary of state, June 19, 1969, § 35 of Ch. 69-106 (§ 20.33, F. S.), clearly expresses a legislative intent that the transfer provisions of the act should be effective as to statutory functions amended by another act of the 1969 Legislature. This expressed intent would appear to overcome the rule of construction applied in the case of conflicting acts passed by the same session, by which the later one passed impliedly repeals the earlier without regard to their effective dates. 22 Fla. Law & Prac., Statutes, § 49. In sum, § 35, Ch. 69-106, Laws of Florida (§ 20.33, F. S.), expresses an intent that transfer provisions of the act shall not be impliedly repealed by other acts of the 1969 Session.

Chapter 69-164, Laws of Florida, remains effective, however, as to that provision of § 367.19, F. S., controlling disposition of tax and penalty proceeds, and amends that provision to require that "All such tax payments and penalties shall be placed in the Florida public service regulatory trust fund as established under the provisions of chapter 350 [Florida Statutes]." The department is therefore required to place funds collected by it in that trust fund.

Both conclusions above stated are in accord with the text of § 367.19 as it appears in the 1969 Florida Statutes.

070-34—April 23, 1970

DEPARTMENT OF ADMINISTRATION  
JURISDICTION OVER PERSONNEL MATTERS OF THE GAME  
AND FRESH WATER FISH COMMISSION

To: *W. Samuel Tucker, Jr., Secretary, Department of Administration,  
Tallahassee*

## QUESTION:

Does the department of administration, which administers laws and regulations relating to career service, have jurisdiction over the game and fresh water fish commission in connection with personnel matters?

Your communication points out that the new constitutional provision establishing the game and fresh water fish commission, Art. IV, § 9, State Const., does not include certain language of the old 1885 State Const., giving the commission explicit supervision and control over its own employees with respect to salaries and selection. Your letter brings to our attention also Ch. 69-343, Laws of Florida (§ 110.051(1), F. S.), providing that the career service shall include all positions not specifically exempted by Ch. 110, F. S., as amended, notwithstanding any other law.

With regard to the new constitutional language, it should be noted that much of the old section establishing the game and fresh water fish commission was not retained in the new document. In fact, throughout the constitutional revision process great stress was placed on deleting unnecessary language in order that a more modern and less verbose state charter would evolve. For instance, Art. IV, § 30(4) and (7), State Const. of 1885, dealing with the commission, states in part that:

(4) Among the powers granted to the commission by this section shall be the power to fix bag limits. . . .

\* \* \* \* \*

(7) The Legislature may enact any laws in aid of, but not inconsistent with, the provisions of this amendment, and all existing laws inconsistent herewith shall no longer remain in force and effect. . . .

Under settled precepts of constitutional law the above authority would exist with or without these two constitutional provisions since other language in the old document ("the management, restoration, conservation, and regulation of the birds, game, [etc.] . . . shall be vested in a Commission . . .") and specific provision in the new constitution ("... The commission shall exercise the nonjudicial powers of the state with respect to wild animal life . . .") vests in the commission such full authority. This is the case also with the former language giving the commission power to select its own employees and set pay scales.

The 1968 State Const., in summary, extends to the commission power to exercise all of the "nonjudicial powers of the state with respect to wild animal life and fresh water aquatic life." In consequence thereof, under settled constitutional law doctrine, all administrative and rule making power in this field inures to the Commission without further language describing its duties. As stated in my previous letter of October 10, 1969: "... In order to administer this entity, it follows that the commission be unbridled in the administration, which includes budget and personnel matters." (Emphasis supplied.)

A statute cannot repeal such constitutional powers whether it is enacted prior to or subsequent to the effective date of the State Constitution. (See AGO 069-78, Aug. 25, 1969, of this publication.)

While I am in sympathy with a desire to effectuate a uniform and more efficient personnel system for the state, I am bound by the clear language of the State Const. giving, in a sweeping phrase, all of the "nonjudicial powers of the state with respect to wild animal life and fresh water aquatic life . . ." to the game and fresh water fish commission. Such nonjudicial power clearly includes all administrative authority, internal or external, pertaining to the administration of its assigned field.

As suggested in several previous communications from this office (See, e.g., AGO 068-32, Mar. 6, 1968, Biennial Report of the Attorney General, 1967-1968, p. 218.), it is my strong feeling that a decision by the commission to voluntarily bring its employees within the rules of the department of administration would underline a progressive and desirable policy in Florida of attaining a uniform and efficient personnel system for the whole state. The constitutional law on the question, as stated above, does not preclude such a voluntary decision.

070-35—April 29, 1970

#### COMPENSATION OF COUNTY FEE OFFICERS

##### JUSTICES OF THE PEACE—AUTHORITY OF BOARD OF COUNTY COMMISSIONERS TO FIX SALARY IN LIEU OF FEES

To: *Thomas J. Shave, Jr., County Attorney, Fernandina Beach*

#### QUESTION:

Under the home rule provision of the State Constitution and the Florida Statutes, does the county have authority to adopt an ordinance placing the justices of the peace and constables of Nassau County on salary and to remove them from the fee system under which they now operate?

Except for the limited delegation of authority to the counties made by Art. VIII, §6(d), State Const., a noncharter county may not adopt an ordinance that is inconsistent with any general or special law. Article VIII, §1(f), State Const. Therefore, the "home rule" powers would be of no help to the board of county commissioners relative to your question.

There is, however, statutory authority for the action which the board of county commissioners desires to take. Under the provisions of §145.14(2), F. S., made applicable to constables and justices of the peace by §145.131(1), F. S., the board of county commissioners may, with the concurrence of any constable or justice of the peace who desires to be placed on a salary basis, by resolution guarantee and appropriate to such officer a salary in lieu of fees "if all fees collected are turned over to the board of county commissioners." The amount of the annual salary is to be fixed by the board of county commissioners but cannot, in any event, exceed \$9,600. Section 145.14(2), F. S.

070-36—April 29, 1970

**REGULATION OF VOCATIONS AND PROFESSIONS  
FLORIDA COSMETOLOGY LAW—ACADEMY OF WIGGERY  
OR ITS INSTRUCTORS NOT SUBJECT TO  
LICENSING REQUIREMENTS**

To: *Eileen Carlton, Chairman, State Board of Cosmetology, Tallahassee*  
QUESTION:

Must an academy of wiggery, which offers courses in fitting, cutting, styling, cleaning and coloring wigs, be licensed as a school of cosmetology and must instructors in such an academy be registered as instructors of cosmetology?

It is apparent that a business need not be registered as a school of cosmetology, and an individual need not be registered as an instructor of cosmetology unless the activities of the business or individual constitute the teaching or practice of cosmetology. Section 477.03(1), F. S., in part, defines the teaching and practice of cosmetology, to wit:

- (a) Cutting or bobbing the hair.
- (b) Facial and scalp massage or treatment with oils, creams, lotions, or other preparations.
- (c) Singeing, shampooing, or coloring the hair or applying hair tonics.
- (d) Applying cosmetic preparations, antiseptics, powders, oil, clay, or lotions to scalp, face, or neck.
- (e) Hairdressing or the arranging, waving, dressing, curling, cleansing, thinning, cutting, singeing, bobbing, bleaching, tinting, coloring, steaming, straightening, dyeing, brushing, beautifying, or otherwise treating by any means the hair of any person.
- (f) Manicuring, or the cutting, polishing, tinting, coloring, cleansing, or manicuring the nails of any person, and massaging.
- (g) Pedicuring, or the shaping, polishing, tinting, coloring, cleansing, or pedicuring the nails of the feet of any person, and massaging, or beautifying the feet of any person.
- (h) Permanent waving or the preparing, arranging, curling, cleansing, and treatment of the hair for curling, by the use of permanent waving machines, mechanical appliances, or chemical heat devices or heat materials, or chemical means.

Paragraphs (b), (d), (f), and (g) are not applicable to the use of wigs because of patent application to some component of the human anatomy or because of specific reference to the word "person." Paragraphs (a), (c), and (h) ostensibly could apply to wigs. These paragraphs contain no specific reference to the word "person" and have no implied limitation to the human anatomy except for the unusual grammatical usage of the article "the" before the noun "hair" in each of the three paragraphs. The grammatical function of an article before a noun is to limit the noun's application. See Webster's New International Dictionary, 2d Ed. Thus, it is my opinion the natural limitation on the noun "hair" by the article "the" in this instance is a limitation to the hair of a person. Otherwise, the article has no apparent application, and the legislature could have merely stated "cutting or bobbing hair," for example.

I may point out that the limitation of the word "hair" to mean the hair of a person makes paragraphs (a), (c), and (h), redundant and overlapping when read in combination with paragraph (e). Paragraph (e) is the most encompassing and inclusive of the pertinent paragraphs of



§ 477.03(1), F. S., and by definition relates to persons. Nevertheless, I believe paragraphs (a), (c), and (h), must be so limited, especially when considered in light of the common law.

In *Brown v. Watson*, 156 So. 327, decided by the Fla. Sup. Ct. in 1934, approximately one year prior to the enactment of Ch. 16800, Laws of Florida, 1935, the first Florida beauty culture act, the court, in a specially concurring opinion at p. 330 cited the following language with approval:

... Largely, and in actual practice, beauty culture is "the application of cosmetic preparation to the *human body* by ... arranging, dressing ... waving, cleansing ... bleaching ... or otherwise treating by any means *the hair of any person* ... " (Emphasis supplied.)

Apparently "beauty culture" is synonymous with cosmetology since the legislature in § 12, Ch. 63-195, Laws of Florida, freely substituted the latter for the former where appearing in Ch. 477, F. S.

Also, it is a highly regarded rule of statutory construction in this state that highly regulatory and penal laws should not be extended by construction. *Brown v. Watson*, 156 So. 330, accord *Fla. Industrial Comm. v. Manpower, Inc. of Miami*, 91 So.2d 197 (Fla. 1956).

Extension of Ch. 477, F. S., to cover wiggery could lead to the anomalous situation where wigs made of hair are within the purview of the act, but wigs produced of synthetic materials are not within its purview.

Accordingly, considering that the common law of Florida refers to cosmetology in terms of the human body and considering Ch. 477, F. S., is a regulatory and criminal statute subject to strict construction for the purposes of constitutionality, academies of wiggery need not be licensed as schools of cosmetology nor their personnel be registered as instructors of cosmetology. Your question is answered in the negative.

070-37—April 30, 1970

#### PUBLIC MEETINGS

GOVERNMENT IN THE SUNSHINE—CONSTRUCTION  
OF § 286.011, F. S.; BOARD OF PUBLIC INSTRUCTION  
OF BROWARD COUNTY *v. DORAN*  
(224 So.2d 693) AND TIMES PUBLISHING  
COMPANY *v. WILLIAMS* (222 So.2d 470)

To: Elwyn L. Middleton, Town Attorney, Palm Beach

#### QUESTION:

What is the impact of the decision of the Supreme Court in *Board of Public Instruction of Broward County v. Doran*, 224 So.2d 693 on meetings of the town council under the government in the sunshine law, § 286.011, F. S.?

In the above-mentioned case the chancellor had enjoined the defendant board from holding a meeting or "conference session" at which a quorum was present, at which official action was taken or to be taken, at which it received reports from its superintendent or other personnel, or "at which are held any discussion on current, or foreseeably so, matters, *not privileged*, pertaining to the duties and responsibilities" of the board. (Emphasis supplied.) On appeal, the Supreme Court affirmed with one modification: Stating that the statute "contains no exception," it amended that portion of the decree quoted above to read,

"at which are held any discussions on matters pertaining to the duties and responsibilities" of the board.

The court had previously noted that "Apparently the defendant understands the injunction and what it encompasses, but complains in its brief because certain matters can no longer be discussed by the board in private. His [sic] causes of complaint, if deserving, are matters for the legislature, not the courts." 224 So.2d p. 700. It is fair to assume that the defendant board understood the nature not only of the matters that, under the chancellor's decree, it was "privileged" to discuss in a closed meeting but also of those that, under the Supreme Court's amendment thereto, must be open to the public and the press. The reader who does not have the benefit of the defendant board's brief can surmise that the "privileged" matters were in two areas: 1. The suspension or reprimand of personnel, which are "occasions of privilege," see *Atwater v. Morning News Co.*, Conn. 1896, 34 A. 865, 868, and 2. Conferences with its attorney, the attorney-client privilege.

Your inquiry did not request my opinion concerning the impact of the *Doran* decision on the deliberations of the board when acting in a quasi-judicial capacity concerning suspensions or reprimands of personnel, and none is expressed. It might be noted, however, that the 1st District Court of Appeal has recently held unequivocally that the legislature cannot validly prescribe the conduct of the internal government of the judicial branch, and that quasi-judicial deliberations of an administrative body are not within the purview of the Sunshine Law. See *Canney v. Board of Public Instruction of Alachua County*, Fla.App.1970, 231 So.2d 34. This decision would, of course, be inconsistent with the *Doran* opinion if the latter is to be construed as holding that the Sunshine Law prohibits closed sessions of an administrative body when acting in a quasi-judicial capacity.

The second item of "privilege" that must have been encompassed by the chancellor's decree has to do with the attorney-client privilege. The decree, as amended by the Supreme Court, was obviously intended to prohibit closed meetings between the board and its attorney concerning matters "pertaining to the duties and responsibilities of the board." (Emphasis supplied.) However, the amended decree did not, in terms, prohibit closed meetings between the board and its attorney concerning the duties and responsibilities of the attorney. And in *Times Publishing Company v. Williams*, Fla.App.1969, 222 So.2d 470, the 2d Dist. Ct. of App. pointed out that there is a distinction between the "privileged communication" rule as it applies to a client and to his attorney. It said, at p. 475:

The attorney-client relationship is a unique one under the law. Within this relationship both the attorney and the client enjoy rights and privileges independent of each other. The privilege the client enjoys is one of confidentiality. The privilege of confidentiality can be waived and the effect of Chapter 67-356 [§ 286.011, F. S.] has been to waive the privilege on behalf of the board. The clear import of the "All meetings" provision of this statute is that the public, acting through the legislature, has waived the privilege with regard to the enumerated public bodies.

The court concluded, however, that the statute could not validly be interpreted as intending to require an attorney to breach the code of ethics which, under Canon 8 requires an attorney to advise his client concerning the conduct of pending or impending litigation. The court stated that an attorney "has the right and duty to practice his profession in the manner required by the Canons, unfettered by clearly conflicting legislation which renders the performance of his ethical

duties impossible," pointing out that in some circumstances the consultation should be private and confidential so as not to jeopardize the settlement.

The court's final decision was that the board's discussions of matters relating to school personnel and consultations with its attorney on legal matters were required to be open 222 So.2d p. 476.

... with the one narrow exception as noted above, i.e., where public consultation with its attorney regarding pending or impending litigation would force him to violate the Canons of Ethics as promulgated by the Supreme Court."

Apparently, the Supreme Court had not been advised of the *Williams* decision at the time it handed down its decision in the *Doran* case. Had it been so advised, it is fair to assume that it would have adverted to the *Williams* decision—either rejecting or adopting as an addendum to its own opinion the appellate court's conclusion concerning the impact and nonapplicability of the Sunshine Law to discussions in discharge of the duties and responsibility of the attorney under Canon 8 of the code of ethics. And it seems to me that it is not unreasonable to assume that it would have adopted it. But regardless of the ultimate conclusion in this respect—when finally clarified judicially or legislatively—the dilemma in which you and other city attorneys now find yourselves should, in my opinion, be resolved by relying upon the clear and unambiguous directive of the *Williams* case—since, as noted above, this directive is not, in terms, in conflict with the mandate in the *Doran* case nor is it necessarily inconsistent with the spirit of that decision.

Considerations of public policy also recommend this course of action. Although referred to only indirectly in the *Williams* case, it is clear that the interpretation of the statute therein made will have the desirable result of protecting the public interest in a most delicate and sensitive area: the public purse. Any taxpayer who is given the choice of learning the details of a proposed settlement of litigation *before* the fact of settlement, thereby jeopardizing the successful negotiation thereof, and of learning the details *after* a settlement, favorable to the city or other public body has been concluded, would unquestionably opt for the latter.

070-38—April 30, 1970

#### PUBLIC OFFICERS

#### STANDARDS OF CONDUCT—VIOLATIONS OF § § 112.311-112.318, F. S., CONSTRUCTION AS CONSTITUTING A PENAL OFFENSE

To: David H. Bludworth, Assistant State Attorney, West Palm Beach

#### QUESTION:

Is a violation of the Standards of Conduct Law, § § 112.311-112.318, F. S., sufficient, per se, to form the basis for an indictment or information charging the common law offense of malpractice in office?

It is necessary that sufficient statutory authority should exist for declaring any act or omission a criminal offense. Ex parte Amos, Fla. 1927, 112 So. 289, 295. I recently ruled, in AGO 070-2, of this publication, that the standards of conduct law contains no criminal

sanctions nor does it indicate that a violation thereof will be deemed a crime. It is not a penal statute.

Nor is there any basis for concluding that the standards of conduct law was intended to be declaratory of a common law offense that was adopted as the law of this state by what is now § 775.01, F. S., "where there is no existing provision by statute on the subject." The common law offense of malfeasance, misfeasance, or nonfeasance in office (collectively referred to as malpractice in office) relates to official conduct that involves corruption, moral turpitude or like evil intent or purpose. *Ex parte Amos*, above, 112 So. 294, 296. The standards of conduct law prohibits the conduct and relationships therein proscribed regardless of whether the official action was undertaken with evil intent or with the best and purest of motives. The object of such a statute "is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct." *Stigall v. City of Taft*, Col. 1962, 375 P.2d 289. Cf. *City of Coral Gables v. Weksler*, Fla.App.1964, 164 So.2d 260. As pointed out in *United States v. Mississippi Valley Generating Corp.*, 1961, 364 U.S. 520, 5 L.Ed.2d 268, 81 Sup. Ct. 295, with respect to a federal conflict of interest statute similar to our standards of conduct law, 364 U.S. at p. 549:

The statute is thus directed not only at dishonor but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.

Since, then, the standards of conduct law prohibits conduct that would not constitute the common law offense of malpractice in office, a violation thereof is insufficient, standing alone, to form the basis for an indictment or information charging the common law offense. Cf. *Sullivan v. Leatherman*, Fla. 1950, 48 So.2d 836, striking down a common law indictment for malpractice in office for failure to meet "constitutional and statutory requirements." Your question is answered in the negative.

070-39—May 1, 1970

#### MUNICIPAL OFFICERS

#### SUSPENSION OF COUNCILMEN OF CITY OF EDGEWATER UNDER §§ 166.16 AND 165.18, F. S.—INCONSISTENCY BETWEEN GENERAL AND SPECIAL LAWS

To: *Charles A. Hall, City Attorney, City of Edgewater*

#### QUESTION:

Are the members of the city council of the City of Edgewater subject to suspension or removal under the provisions of general law, §§ 166.16 and 165.18, F. S.?



Your question is answered in the affirmative.

The charter of the City of Edgewater, Ch. 27532, Laws of Florida (Special Acts), 1951, provides that a city councilman shall *forfeit* his office when he is *convicted* of a crime or when he no longer holds the qualifications prescribed for the office by the charter. Provision is made also for a recall election of a city councilman upon the petition of 40% of the registered voters. (Added by Ch. 29049, Laws of Florida (Special Acts), 1953). On the other hand, the general law provides for the *suspension* of any municipal official by the governor upon *indictment* for a crime arising out of official misconduct. § 166.16, F. S., 1969.

It is well settled that when there is a conflict between the general law and special charter provisions, the special charter provisions will prevail. *City of Orlando v. Evans*, Fla. 1938, 182 So. 264 and cases cited. However, I find no conflict or inconsistency between a general act providing for suspension upon indictment for a crime, and a special act declaring that the office is automatically forfeited when the official is convicted of a crime. Each has its sphere of operation and is, in fact, supplementary to the other instead of being inconsistent therewith.

Nor is there a conflict between the charter provision for recall of a city councilman at the behest of the registered voters because of malpractice in office, and the general law provision, § 165.18, F. S., authorizing the city council, by a two thirds vote, to remove from office any city official "for disorderly behavior or malconduct in office." Here, again, the recall provision of the special charter act is merely supplementary to the provisions of the general law—lodging in the electorate the right to take action against a misbehaving city councilman when his fellow councilmen fail or refuse to do so.

There is nothing in the charter to indicate that the charter provisions were intended to provide the entire and exclusive procedure for the removal of city councilmen for malpractice in office. To the contrary, the charter provides that all general laws of the state applicable to municipalities that are not in conflict with the charter or ordinances adopted by the city pursuant thereto "shall be applicable to the City of Edgewater . . ." Section 143, Ch. 27532, Laws of Florida, 1951.

I find no conflict between the charter provisions and the applicable general law, therefore, your question is answered in the affirmative.

070-40—May 4, 1970

#### TAXATION

##### DRAINAGE ASSESSMENTS—LIABILITY OF SCHOOL BOARD TO PAY

To: *Don T. Adams, Attorney for Board of Commissioners, East Beach Water Control District, Pahokee*

#### QUESTION:

Should district drainage assessments levied against property of school board be paid?

In the district's enabling acts, I find no specific provisions regarding assessments levied against school properties. Although § 235.34, F. S., authorizes the board to expand funds for the purpose of paying certain assessments against school properties, there appears to be no judicial determination that this law includes drainage assessments. See *Board of Public Instruction v. Little River Valley Drainage District*, Fla.App.1960, 119 So.2d 323, 326. In addition, the board's authorization to pay

assessments under the statute is limited to those "lawfully imposed," which the court indicates requires approval of assessments by the Board under the related provisions of §192.08[§196.30], F. S. Board of Public Instruction v. City of Jacksonville, Fla. 1956, 86 So.2d 887.

Even assuming statutory authorization for the assessment and its payment, the board is not *required* to make payment because of the decision of the court in the case last cited, holding that the term "authorized" in §235.34, F. S., does not mean "directed." Under current law the stated question must therefore be determined by the board of public instruction in the exercise of discretion vested in it by the statute.

070-41—May 5, 1970

#### OUT-OF-STATE NOTARY PUBLIC

#### ACKNOWLEDGMENT OF INSTRUMENTS FOR RECORDING IN COMPLIANCE WITH §695.03, F. S.—CERTIFICATE OF AUTHORIZATION

To: Thomas H. Warlick, County Attorney, Orlando

#### QUESTION:

In states in which an official notarial seal is not required but the notary public nevertheless procures a notarial seal, does the affixing of such seal to the notary's certificate of acknowledgment on an instrument executed and acknowledged in such state entitle it to recordation in Florida under §695.03(2), F. S.?

Section 695.03(2), F. S., was amended in 1969 (Ch. 69-79, Laws of Florida) to provide that in states not requiring a notary public to have a seal,

... such notary public *shall* have affixed to the instrument, in lieu of an official seal, a certificate by the proper authority, wherein the commission of said notary public has been filed, that said notary public is duly authorized by the laws of such state to certify the acknowledgment or proof of a deed or any other instrument concerning real property; and such clerk's certificate *shall* be under the seal of the said proper authority. (Emphasis supplied.)

There is nothing in the statute from which it can be inferred that the legislature used the word "shall" in any except its usual mandatory sense. Moreover, the statement that the prothonotary certificate is to be filed "in lieu of an official seal" (Emphasis supplied.) is consistent with an intention to require such certificate when the state law fails to prescribe an official notary public seal as a prerequisite to the validity of his acknowledgment. Cf. §117.07, F. S., prescribing the words "Notary Public—State of Florida at Large" to be used on the official seal of notaries public in this state.

That a prothonotary certificate and a notarial seal are not intended to be interchangeable is indicated by Standard 3.11 of the Uniform Title Standards adopted by The Florida Bar (see Vol. 20 F.S.A., 1969 Pocket Part, p. 47), which provides that a prothonotary certificate cannot be used in lieu of the official seal of a notary public required by §695.03(1)-(3), F. S., to be affixed to his certificate of acknowledgment. It is noted parenthetically that Standard 3.11 was adopted in 1963, prior to the 1969 amendment to §695.03(2), F. S.

I do not share your fear that this interpretation of the statute would place a "time consuming" burden upon the clerk. It would seem that the person presenting an out-of-state instrument for recordation would be charged with the responsibility of making sure that the acknowledgment (whether accompanied by a prothonotary certificate or a purported "official seal" of the notary public) complies with § 695.03(2), F. S., and that the clerk would have no duty to make an independent investigation in this respect before recording the instrument. In AGO 049-75, Feb. 24, 1949, Biennial Report of the Attorney General, 1949-1950, p. 562, one of my predecessors in office held that § 695.03, F. S., "is not concerned with the validity of the document" to be recorded and that any question as to its validity is to be settled by the parties and not by the clerk. By the same token, it seems that any defect in the acknowledgment, *dehors* the record, would be a question to be settled by the parties and that, *so long as the acknowledgment is valid on its face*, the clerk's only duty in the premises would be to record the instrument.

Subject to the above comments, your question is answered in the negative.

070-42—May 7, 1970

#### GAME AND FRESH WATER FISH COMMISSION

##### YOUTH CONSERVATION CAMPS—USE OF LAND ACQUISITION TRUST FUND FOR RECREATIONAL FACILITIES

To: O. E. Frye, Jr., Director, Division of Game and Fresh Water Fish, Tallahassee

#### QUESTION:

Does the land acquisition trust fund have authority to grant to the division of game and fresh water fish funds to provide facilities at the South Florida youth conservation camp to comply with state health regulations?

I perceive, from your correspondence to me, that this establishment is in the J. W. Corbett wildlife management area. I am well aware that what is now the division of game and fresh water fish has for years conducted a youth conservation camp in the Ocala national forest. I am also well aware of the tremendous effect that camp has had upon education of our young people on conservation and upon their education that is now denominated as environmental control. I am also aware of the tremendous effort that your wildlife officers have personally given to this program.

As I read Ch. 372, F. S., which is the chapter governing what is now the division of game and fresh water fish, and as I read Ch. 375, F. S., which is the chapter governing the division of recreation and parks (See § 25, Ch. 69-106, Laws of Florida (§ 20.25, F. S.)), I believe the intent of the legislature to be that those funds are set aside to be included in the land acquisition trust fund which we of the cabinet have traditionally and legally provided for recreational areas throughout the state. I can see no difference in providing funds from the 15% land acquisition trust fund for building a boat ramp to provide access to a recreational area and providing sanitary facilities for a youth camp.

I note that the outdoor recreation and land acquisition advisory committee has traditionally approved a sum of money within the 15% limitation for the establishment of sanitary facilities at J. W. Corbett wildlife management area and I find no statutory restriction that prohibits this in view of the fact that for many years a youth conservation camp has been operated in Marion County.

070-43—May 7, 1970

**RECORDATION OF INSTRUMENT CONVEYING  
REAL ESTATE**

**DUTY OF THE CLERK OF CIRCUIT COURT IN COMPLYING WITH  
§ 695.03, F. S.—VALIDITY OF INSTRUMENT**

*To: Lavaughn A. Sessions, Clerk of the Circuit Court, Live Oak*

**QUESTIONS:**

Is it the duty of the clerk of the circuit court to record a deed or contract for deed presented for recordation when such instrument

1. Has been properly executed and acknowledged but has not been witnessed?
2. Was prepared prior to January 1, 1968, and does not contain a notation as to the name of the person who prepared the instrument?

Both questions are answered in the affirmative.

Even though a deed or contract for deed is not, ordinarily, valid unless it has been "signed in the presence of two subscribing witnesses" as required by § 689.01, F. S., *Petersen v. Brotman*, Fla.App.1958, 100 So.2d 821, and cases cited, it is not the duty of the clerk to pass on the validity of the instruments presented for recordation. As stated in AGO 049-75, Feb. 24, 1949, Biennial Report of the Attorney General, 1949-1950, p. 562:

... the recording statute, Section 695.03, is not concerned with the validity of the document and requires only that it be acknowledged. Therefore, it is your duty to record such instrument when duly acknowledged regardless of whether or not it has any witnesses.

Your duty as to recordation of a properly acknowledged instrument applies to one that was executed and acknowledged in another state pursuant to the requirements of § 695.03(2), F. S., as well as to an instrument executed and acknowledged in this state.

The first part of your question is, therefore, answered in the affirmative.

Section 695.24(2), F. S., requiring the name and address of the preparer of an instrument presented for recordation to be noted on the face of the instrument, specifically excepts from the statutory requirement "any instrument executed before the effective date of this section . . ." The effective date of the act was January 1, 1968.

Accordingly, the second part of your question is also answered in the affirmative.

070-44—May 7, 1970

**OCCUPATIONAL LICENSE TAXES**

**AUTHORITY OF COUNTY TAX COLLECTOR TO COLLECT  
TAX FROM FRANCHISED AND NONFRANCHISED  
GARBAGE COLLECTORS**

*To: G. D. Bogue, Tax Collector, Palatka*

**QUESTIONS:**

1. May the Putnam County tax collector require a garbage collector to pay the occupational license tax required by § 205.471, F. S.?



2. Does the board of county commissioners have the right to limit the number of franchised garbage collectors in the county?

Section 205.471, F. S., requires the payment of a state and county occupational license tax for the performance of "some service for the public in return for a consideration." Subsection (2) contains the following exception in part:

No license shall be required under this section for any business the principal function of which is the performance of some service for the public in return for a consideration when the nature of the service is such that an occupational license is required of the business by some other law of this state . . . .

It appears from your letter that some garbage collectors have been operating in the county without having been "franchised" by the board of county commissioners under the authority of Ch. 65-2148, Laws of Florida. As to those businesses, the tax collector clearly has the authority to require the purchase of the occupational license tax provided for by § 205.471, F. S. As to those garbage collectors who have been operating under franchises from the county commissioners and paying an annual fee of \$10 and a monthly percentage of their gross receipts to the county, the answer is not so obvious. It seems, however, that the annual and monthly fee might be interpreted as compensation to the county for the cost of regulating the garbage collection service and maintaining the county dump for the benefit of such franchised collectors, and not as an "occupational license" fee within the exception to § 205.471, F. S., quoted above. Cf. § 205.141, F. S., providing that fees paid to any board or commission for a permit or for "other regulatory purposes" are in addition to and not in lieu of the occupational license tax provided for in Ch. 205, F. S. Unless and until it is judicially determined to the contrary, I am inclined to the view that the state and county occupational license tax required by § 205.471, F. S., may be collected from franchised as well as from nonfranchised garbage collectors in Putnam County.

Subject to the foregoing comments, question 1 is answered in the affirmative.

Question 2 concerns the duties of the board of county commissioners, and I must beg your indulgence and decline to answer it under the policy of this office to refrain from comment on the official actions of one public body at the request of another official. However, your attention is directed to *Broward County Rubbish Con. Ass'n v. Broward County*, Fla.App.1959, 112 So.2d 898, holding that the discretionary power of the board of county commissioners under special act authority in granting an exclusive garbage franchise would not be interfered with by the courts, in the absence of fraud or gross abuse of discretion.

070-45—May 8, 1970

## COURTS

### COURT REPORTERS, COMPENSATION—CONSTRUCTION OF § 29.03 AND 29.04, F. S.

To: D. T. Farabee, Clerk, Circuit Court, Fort Myers

#### QUESTION:

What is the compensation of court reporters for routine attendance at court and reporting hearings and trials in connection with the enforcement of the criminal laws of this state?

A court reporter's salary prescribed by § 29.04, F. S., is intended to compensate him for all routine attendance at, and reporting of, hearings and trials in connection with the enforcement of the criminal laws of this state. Attorney General's Opinion 064-66, May 20, 1964, Biennial Report of the Attorney General, 1963-1964, p. 346. His salary is payable by the state treasurer on the requisition of the court reporter. Section 29.04, F. S. When he is required to supply a transcript of the criminal proceedings at the request of the judge, the state attorney, or the defendant, he is entitled to compensation for each folio and carbon copy thereof at the rate prescribed by § 29.03, F. S. If requested to do so by the judge or either party, he is required to report the argument of counsel to the jury, for which he receives a fee of \$10 for each argument. His fees for reporting the argument and preparing a transcript and copies of the proceedings are chargeable as costs in the proceedings and assessed against either the county or the defendant, depending upon the circumstances. Attorney General's Opinion 064-66, as mentioned above.

A court reporter's attendance at and reporting of grand jury hearings are also part of his official duties for which no extra compensation can be claimed. Attorney General's Opinion 059-119, June 18, 1959, Biennial Report of the Attorney General, 1959-1960, p. 185. If a transcript of the testimony of witnesses before the grand jury is, pursuant to an order of or with the permission of the court, furnished to "an authorized state official," the court reporter will be entitled to the fee prescribed by § 29.03, F. S., for each folio of the transcript and copy thereof. This is a normal criminal expense to be paid by the county. Attorney General's Opinion 058-50, Feb. 14, 1958, Biennial Report of the Attorney General, 1957-1958, p. 533.

070-46—May 11, 1970

#### PUBLIC OFFICERS

#### PROHIBITION AGAINST HOLDING DUAL OFFICES—APPOINTMENT OF CITY COMMISSIONER AS MUNICIPAL JUDGE—EMPLOYMENT OF CITY COMMISSIONER AS FIREMAN

To: *Thomas J. Rivers, City Attorney, Green Cove Springs*

#### QUESTIONS:

1. May a city commissioner legally be appointed to serve as municipal judge?
2. May a city commissioner legally be employed as a fireman in the city's regular fire department?

As you perhaps know, I cannot invade the province of the judiciary by passing on the validity of a charter provision or ordinance adopted pursuant thereto; however, in view of the importance of the question and the commendable interest of the city commissioners in avoiding any action that might ultimately be judicially declared to be unauthorized or illegal, I see no impropriety in setting out the well-settled principles of law that are applicable here.

At common law, all officers who have the appointing power are disqualified for appointment to the offices or positions to which they may appoint. 67 C.J.S., *Officers*, § 20, p. 130; 42 Am.Jur., *Public Officers*, § 97, p. 955. The reason for the public policy rule in this respect has been variously stated: In *Wood v. Whitehall*, 1923, 197 N.Y.S. 789, the court said that such an appointment is against good conscience and public morals; in *Hetrich v. County Commissioners of*

Anne Arundel County, Md. 1960, 159 A.2d 642, 645, the prohibition was grounded on the need for impartial official action without suspicion of bias; and in *Ehlinger v. Clark*, Tex. 1928, 8 S.W.2d 666, the court said that the rule was based on "the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body . . . ."

The common law rule prohibiting the holding of two incompatible offices referred to in the *Ehlinger* case, above, 8 S.W.2d 666, is founded also on principles of public policy. See 67 C.J.S., *Officers*, § 23, p. 133. The incompatibility that will disqualify lies in a conflict between the duties and functions of the two offices, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one has the power to appoint or remove or set the salary of the other, or where the duties clash, inviting the incumbent to prefer one obligation over the other. See 67 C.J.S., *Officers*, § 23, p. 135; *McQuillin*, *Municipal Corporations*, § 12.67; *Reilly v. Ozzard*, N.J. 1960, 166 A.2d 360, 367; *Byrd v. State*, Ark. 1966, 402 S.W.2d 121, 123; *Board of Supervisors v. Attorney General*, Md.App. 1967, 229 A.2d 388, 394; *State v. Independent Consolidated School District*, Minn. 1953, 61 N.W.2d 410; *Mott v. Horstmann*, Cal. 1950, 224 P.2d 11.

The public policy derived from the common law can, however, be changed by the lawmakers. See 16 C.J.S., *Constitutional Law*, § 74, p. 225. A constitutional statute cannot be contrary to public policy since it is public policy. *State v. Coyle*, Okla., 122 P. 243. And it appears that the legislature has attempted to change the common law rules referred to above insofar as the problem posed in question 1 is concerned. § 37 of the Green Cove Springs Charter (Ch. 21262, Laws of Florida, 1941), created a municipal court and the office of municipal judge—to be appointed by and to serve at the pleasure of the city commission—and expressly provided that a member of the city commission may be "appointed and serve as such municipal judge in addition to his duties and powers as city commissioner." Thus, the real question here is whether there are any constitutional inhibitions that will serve as a bar to the legislature's attempt to relieve the city commissioners from the impact of the common law rules referred to above.

This state, early in its history, extended the common law rule so as to prohibit, without regard to the question of incompatibility, the holding of more than one office of profit under the federal, state or county governments (see Art. VI, Clause 18, State Const. of 1838; Art. XVI, § 15, State Const. of 1885); and our new 1968 State Const. brings municipal officials also within the dual office prohibition (Art. II, § 5, State Const., 1968)—the reason for the extension of the common law rule being apparently "to prevent multiple office holding so that offices and places of public trust will not accumulate in a single person." 42 Am.Jur., *Public Officers*, § 58, p. 926. The common law rule does, however, still have life in this state and has been applied to prohibit an official from accepting other incompatible employment in government. See AGO 045-8, Jan. 9, 1945, Biennial Report of the Attorney General, 1945-1946, p. 127, holding that a county commissioner cannot be employed as a deputy sheriff at that time held not to be an "officer" in contravention of the common law rule referred to above. Cf. *Reilly v. Ozzard*, N.J. 1960, 166 A.2d 360, 365.

As noted above, at the time of the adoption of the Green Cove Springs Charter in 1941, municipal officials were not covered by the constitutional prohibition against dual office holding then in effect, Art. XVI, § 15, State Const., 1885. Now they are, Art. II, § 5, State Const., 1968; and there can be no doubt that a municipal judge is a municipal

"officer" within the intendment of the constitutional prohibition in question. I have recently so ruled in a letter under date of March 12, 1970, directed to the Hon. J. W. Clark. Thus, the charter provision in question might run afoul of the constitutional dual office prohibition unless it could be construed as providing merely for the performance by a city commissioner, *ex officio*, of the duties of municipal judge.

It is well settled that the dual office prohibition does not preclude the assignment to one office of the duties of another, where there is no inconsistency between the two classes of duties. 67 C.J.S., *Officers*, § 23, p. 148; 42 Am.Jur., *Public Officers*, § 62, p. 929; *Whitaker v. Parsons*, Fla. 1920, 86 So. 247; *State ex rel. Landis v. Reardon*, Fla. 1934, 154 So. 868; *Advisory Opinion to Governor*, Fla. 1941, 1 So.2d 636; *State v. Florida State Turnpike Authority*, Fla. 1955, 80 So.2d 337. A statute imposing an *ex officio* post or position upon the holder of another office must, however, be distinguished from one *authorizing the appointment* of one office holder to another distinct and separate office. In the latter situation, the dual office prohibition will apply. See *In re Advisory Opinion to the Governor*, *supra*, 1 So.2d 636, invalidating under Art. XVI, § 15, State Const., 1885, a statutory provision authorizing the governor to appoint "two state officials" as members of the state planning board. And in AGO 053-27, Feb. 6, 1953, Biennial Report of the Attorney General, 1953-1954, p. 123, one of my predecessors in office ruled that a statute creating a small claims court and providing for the election of a small claims court judge could not constitutionally authorize the local justice of the peace to serve also as the small claims court judge. It is noted that the statute did not designate the incumbent justice of the peace as *ex officio* judge of the small claims court; that, on the contrary, it treated them as two separate and distinct elective offices so that the provision for the appointment of one to the other "quite apparently is violative of Art. XVI, § 15, Florida Constitution."

The charter provision in question creates the office of municipal judge as a separate and distinct office to be filled by an appointee named by the city commission. It does not designate the office of municipal judge an *ex officio* office to be performed as an additional duty or function of a city commissioner; on the contrary, it provides in terms that the city commission *may* appoint one of its own members to the office. In these circumstances it is, at least, doubtful that the right to hold both offices at the same time would be judicially upheld as the performance *ex officio* by a city commissioner of the duties of municipal judge.

As to question 2, the common law rule prohibiting an official from accepting another position, even though not an "office," that is incompatible with the duties and functions of his office, referred to above, is applicable here. Under the charter, the city commission is authorized to investigate at any time the conduct of any officer or employee of the city; it is charged, also, with the responsibility of fixing the number and the compensation of all city officers and employees not specifically provided for by the charter. The powers and duties of a city commissioner in these respects are incompatible with his employment as a city fireman under the common law definition of incompatibility. Accordingly, question 2 is answered in the negative.



070-47—May 18, 1970

## TAXATION

DOCUMENTARY STAMP TAXES PAYABLE BY NATIONAL  
BANKS UNDER § 201.08(1) AND 201.09, F. S.

To: J. Ed. Straughn, Executive Director, Department of Revenue,  
Tallahassee

## STATEMENT OF FACTS:

The amendment to § 5219 of the federal revised statutes, 12 U.S.C. 548, effective Dec. 24, 1969, authorizes the imposition of taxes, except on intangibles, against national banks. The following questions are presented with reference to renewal of promissory notes upon which documentary stamp tax was paid and no stamps affixed:

## QUESTIONS:

1. If a promissory note, made on or after Dec. 24, 1969, is given in renewal of an existing promissory note, made during the period when banks were exempt from the payment of the documentary stamp tax, which extends or continues the existing obligation, is such renewal note taxable under § 201.08(1), F. S.?

2. If a promissory note made on or after Dec. 24, 1969, is given in renewal of an existing promissory note made during the period when banks were exempt from the documentary stamp tax, which shows an increase in the rate of interest in a note extending or continuing the original obligation, is the new note taxable under § 201.08(1), F. S.?

3. A note was executed in favor of a bank at a time when banks were exempt from the documentary stamp tax. The note is then renewed by the borrower after banks became subject to the documentary stamp tax. Under such circumstances, is the renewal of the original note subject to documentary stamp tax if the "renewal" is just noted on the original note?

Questions 1 and 2 are answered in the affirmative, and question 3 in the negative, subject to the qualification hereinafter stated. Section 201.09, F. S., provides:

When any promissory note is given in renewal of any existing promissory note, which said renewal note only extends or continues the identical contractual obligations of the original promissory note and evidences part or all of the original indebtedness evidenced thereby, not including any accumulated interest thereon and without enlargement in any way of said original contract and obligation, such renewal note shall not be subject to taxation under this chapter *if such renewal note has attached to it the original promissory note with canceled stamps affixed thereon showing full payment of the tax due thereon.* (Emphasis supplied.)

Because the exemption provided by this statute is expressly limited to those renewal notes which have attached the original promissory note "with canceled stamps affixed," there can be no question as to taxability of renewal notes when the attached original promissory note, as in the stated examples, does not have canceled stamps affixed. Under ordinary rules of statutory construction requiring strict application of exemption provisions, the quoted language cannot be extended to cover

renewals of notes which do not have canceled stamps affixed, but instead were exempt. This conclusion follows from a consideration of both the language and apparent intent of the law regarding renewal notes as a new and independent transaction which would be covered by § 201.08(1), F. S., but which may be accorded exemption and avoid the second payment of the tax upon proof that stamps were affixed to the original note.

An earlier AGO rendered July 13, 1937, Biennial Report of the Attorney General, 1937-1938, p. 507, is in accord that the exemption is not applicable to renewal of a note which was not taxable when issued. Disposition of question 2 above on this ground makes unnecessary the consideration of the additional statutory requirement for exemption, i.e., that the renewal note "only extends or continues the identical contractual obligation of the original promissory note."

Question 3 is answered in the negative, so that a notation on the original note will not incur the tax, *only if such notation is "without a signing or its equivalent . . . by or for the payee or other party granting the extension."* *Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909. The decision in that case was limited to the point that notation of "interest paid" or "note extended" to a specified date was insufficient evidence of a binding transaction to incur the tax in the absence of a signature or its equivalent. It is clear that the decision and opinion do not make renewals nontaxable simply because they are noted on the original note. Such renewals will be taxable, subject to the exemption in § 201.09, F. S., if the endorsement has a signature or equivalent documentary evidence of a binding renewal contract between the parties.

070-48—May 21, 1970

#### REGULATION OF VOCATIONS

##### CONSTRUCTION INDUSTRY—REQUIREMENTS FOR ISSUANCE OF PERMIT OF OCCUPATIONAL LICENSE BY MUNICIPALITY

To: *R. Dewey Burnsed, City Attorney, Leesburg*

##### QUESTION:

May a municipality require a contractor certified or registered under the provisions of part II of Ch. 468, F. S., entitled, licensing of construction industry, to post a performance bond as a prerequisite to the issuance of a building permit or occupational license?

In 1967 the Florida legislature enacted Ch. 67-110, Laws of Florida, which has been codified and appears in the Florida Statutes as part II of Ch. 468. The purpose for enacting this law is contained in § 468.101, F. S., as follows:

It is hereby declared to be the public policy of the state that, in order to safeguard the life, health, property and public welfare of its citizens, the business of construction and home improvements is a matter affecting the public interest, and any person engaging in the business as herein defined should be required to establish his competency and qualifications to be registered or certified as herein provided.

Thus, the legislature, in order to safeguard the life, health, property and public welfare of the citizens of Florida, required general contractors, building contractors and residential building contractors to establish their competency and qualifications to engage in their business by either

being registered or certified as provided in the act. This is a giant step forward, by the legislature, to establish for the first time the competency and qualifications of contractors on a uniform basis throughout the state.

The Florida construction industry licensing board, created under § 468.103, F. S., is charged with the duty and responsibility of administering the provisions of part II of Ch. 468, F. S.

Registration under the provisions of § 468.105, F. S., is primarily obtained by compliance with a local board's competency examination and limits the licensee in his territorial operation.

In order to obtain a certificate of statewide application from the Florida construction industry licensing board, an applicant must, under the provisions of § 468.106, F. S., take an objective written examination to determine his fitness in the category for which application is made. The examination shall cover the applicant's knowledge of basic principles of contracting and construction and consist of multiple-choice, fill-in, true-false, or short-answer questions and may include diagrams, plans, or sketches. Upon successfully passing the written examination with a grade of seventy-five or more, the board shall investigate the financial responsibility and credit, business reputation, education, and experience of the applicant and any business organization on behalf of which he proposes to engage in contracting.

Section 468.106(6), F. S., provides that:

When a certificate holder desires to engage in contracting in any area of the state, as a prerequisite therefor, he shall only be required to exhibit to the local building official, tax collector, or other person in charge of the issuance of licenses and building permits in the area, evidence of holding a current certificate accompanied by the fee for the occupational license and building permit required of other persons.

Section 468.113(5), F. S., pertaining to the application of part II of Ch. 468, F. S., specifically provides:

Any official authorized to issue building or other related permits shall ascertain that the applicant contractor is duly registered in the area where the construction is to take place or certified before issuing the permit. The evidence shall consist only of the exhibition to him of current evidence of certification or registration.

It therefore, appears that the only prerequisite a municipality may require of a contractor prior to the issuance of an occupational license and permit is the exhibition by the contractor applicant of evidence of holding a current certificate or registration accompanied by the proper fee.

The provisions of part II, Ch. 468, F. S., have statewide application and in the absence of a special legislative act or municipal charter provision, a municipality cannot require the posting of a performance bond as a prerequisite to the issuance of a permit and occupational license to a certified or registered contractor. However, nothing in this opinion should be construed as prohibiting the owner and contractor from entering into such contractual terms and agreements as they deem proper, including a performance bond, so long as the same are not prohibited by law. It is respectfully suggested that appropriate enabling legislation should be secured by those municipalities desirous of requiring performance bonds of the type suggested in your inquiry. Your question is answered in the negative.

070-49—May 21, 1970

## REVENUE BONDS

LIENS ON PREMISES SERVED BY UTILITY WHOSE REVENUES  
ARE PLEDGED TO PAYMENT OF BONDS—CONSTRUCTION  
OF § 159.17 AND 159.18, F. S.

To: R. Dewey Burnsed, City Attorney, Leesburg

## QUESTIONS:

1. May a municipality foreclose the lien provided for by § 159.17, F. S., to service revenue bonds issued prior to its effective date?

2. May a municipality discontinue service for nonpayment of service charges as authorized by § 159.18, F. S., even though it has no covenant to do so with holders of revenue bonds payable from such revenue?

3. May a municipality discontinue service for nonpayment of service charges incurred by a former occupant of the premises to which the service was supplied?

## AS TO QUESTION 1:

Question 1 is answered in the affirmative. Section 159.17, F. S., added by Ch. 67-550, Laws of Florida, provides that any municipality "issuing revenue bonds hereunder" shall have a lien on the premises served by the facilities for which the revenue bonds were issued until the service charges for the use of such facilities are paid. The general rule is, of course, that statutes are to be construed as operating prospectively unless a contrary intent clearly appears; however, it is well settled that a remedial statute is an exception to the general rule. See *City of Lakeland v. Catinella*, Fla. 1961, 129 So.2d 133, 136; *Heberle v. P.R.O. Liquidating Company*, Fla.App. 1966, 186 So.2d 280. A statute is "remedial" when it is one "pertaining to or affecting the remedy, as distinguished from that which affects or modifies the right." *Black's Law Dictionary*, 4th Ed., p. 1457. Accord: *City of Lakeland v. Catinella*, *supra*, 129 So.2d 133, 136.

Here, the revenue bondholders have a right to the service charges that are pledged to the payment of their bonds, and the municipality has the right, as well as the obligation, to collect such charges for such purpose. Section 159.17, F. S., merely adds an additional remedy for collecting the service charges "in furtherance of the remedy or confirmation of rights already existing," *City of Lakeland v. Catinella*, *supra*, 129 So.2d 133, 136. The question of whether such a lien would take precedence over mortgage or other liens and encumbrances recorded against the subject premises prior to the effective date of § 159.17, F. S., is not presented and no opinion is expressed thereon. Subject to this comment, question 1 is answered in the affirmative.

## AS TO QUESTION 2:

There is nothing in § 159.18 F. S., to indicate that the right to discontinue service for nonpayment of the service charge is dependent upon a covenant with the revenue bondholders to that effect. Accordingly, question 2 is answered in the affirmative.

## AS TO QUESTION 3:

Question 3 is answered in the negative. Section 159.18, F. S., provides that the city may discontinue service "to any users of the facilities . . . for nonpayment of service charges, . . . and may covenant



with the holders of any revenue bonds issued hereunder that it will not restore the supplying of any . . . services to such delinquent users until all charges . . . have been paid in full." (Emphasis supplied.) To authorize the discontinuance of service to a nondelinquent user on account of the delinquency of a former occupant of the premises would be a harsh penalty indeed; and an intent to cut off the services only if the present occupant and user is delinquent is more consistent with the terms of the statute, as emphasized above. I have the view, therefore, that a user who is not delinquent in paying for his own use of the facilities cannot be penalized for the delinquency of a former occupant of the premises; and question 3 is, therefore, answered in the negative.

070-50—May 21, 1970

#### TAXATION

##### ASSESSMENT—SUBDIVISION LOTS AS ACREAGE— CONSTRUCTION OF § 192.31(2)[§ 195.021(2)], F. S., STANDARDS OF VALUE

To: Clark Maxwell, Sr., Tax Assessor, Titusville

#### QUESTION:

Does § 192.31(2)[§ 195.021(2)], F. S., require acreage assessment of subdivision lots constituting more than 40% of the subdivision, conveyed by a developer corporation to four of its stockholders as security for loans of required capital?

Your question is answered in the affirmative, assuming the conveyance in question is determined in fact to have been made solely for security purposes.

The applicable provision of § 192.31(2)[§ 195.021(2)], F. S., states that "platted lands unsold as lots shall be valued for tax assessment purposes on the same basis as any unplatted acreage of similar character, until sixty per cent of such lands included in one plat shall have been sold as individual lots." Section 697.01(1), F. S., requires that "all conveyances . . . or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money . . . shall be deemed and held mortgages . . ."

This rule is recognized by many Florida cases holding that whatever may be its form, an instrument will be held a mortgage if, taken alone or in connection with the surrounding facts, it appears to have been given as security for the payment of money. *Torreyson v. Dutton*, Fla. 1940, 198 So. 796 and *Bemort, Inc. v. Deerfield Beach Bank*, 1961, Fla.App., 134 So.2d 28.

I conclude therefore that recording of the conveyance would not necessarily establish its character as a true conveyance or the fact of sale required by § 192.31(2)[§ 195.021(2)], F. S. Your determination of the factual issue above noted will instead control the question of whether acreage assessment of the property in question should cease.

070-51—May 21, 1970

#### TAXATION

##### LEVYING OF AD VALOREM TAX UNDER §§ 135.01 AND 416.06, F. S., FOR ALTERATION OF JAIL AND JUVENILE HOME

To: Board of County Commissioners, Key West

## QUESTION:

May an ad valorem tax be levied within the present ten mill constitutional limit, if said funds raised thereby were expended for said work within one budget year, without issuing certificates or without extending said tax beyond one year?

Your question is answered in the affirmative, upon a consideration of the provisions of Art. VII, § 12 and 9, State Const., 1968, together with § 135.01 and 416.06, F. S. The opinion of the Sup. Ct. in *State v. County of Dade, Fla.* 1969, 234 So.2d 651, filed Feb. 25, 1970, has been altered by another opinion on denial of rehearing by striking the words "we hold, therefore, that Florida Statute Sec. 135.01 is invalid . . ." and stating instead:

Section 135.01, F.S.A., to the extent that it authorizes a levy to retire any such obligation maturing more than 12 months after issuance has been rendered invalid by the Constitution of 1968." Ibid at 658 (Emphasis supplied.)

The decision therefore does not affect the authorization in § 135.01, F. S., to levy a building tax within the limitations there prescribed. The court simply applied the mandate of Art. VII, § 12, State Const., stating that (except for refunding) ad valorem tax anticipation certificates maturing more than twelve months after issuance may be issued by counties "only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation."

The opinion also notes, "Since the certificates of indebtedness *here under consideration* [i.e. maturing more than twelve months after issuance] can only be issued upon approval of the freeholders, the tax levied to pay the certificates is in addition to, and not included within, the 10 mills allowed for county purposes under Section 9(b), of Article VII." [State Const.] (Emphasis supplied.) This conclusion has reference to the language of § 9(b) excluding from the county 10-mill maximum levy those "taxes levied for the payment of bonds and taxes levied for periods not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation."

The proposed levy, under the circumstances described by your letter, appears to meet the constitutional and statutory requirements construed in the revised opinion of the court on rehearing in the case above cited. An earlier opinion of this office, AGO 069-98, of this publication, treats additional issues presented in connection with levies under Ch. 135, F. S., as affected by § 193.321[§ 200.071], F. S.

070-52—May 21, 1970

## COURTS

JUSTICE OF THE PEACE DISTRICTS—ESTABLISHMENT,  
ABOLISHMENT—MANNER AND EFFECT

To: Verle A. Pope, State Senator, St. Augustine

## QUESTIONS:

1. When a justice of the peace district is abolished, pursuant to the provisions of Art. V, § 11(1), 1968 State Const., are the offices of justice of the peace and constable also abolished?

2. What effect does the abolishment of a justice of the peace district have upon the remaining districts?

## AS TO QUESTION 1:

Article V, § 11(1), 1968 State Const., was originally ratified by the electorate in 1944. Prior to its adoption the county commissioners of each county were required to divide their respective counties into as many justice of the peace districts, not less than two, as they deemed necessary. However, Art. V, § 11(1), 1968 State Const., divested the county commissioners of all express power to divide the counties into justice of the peace districts and their implied power to establish, abolish or change boundaries and vested exclusive power in the legislature to establish or abolish districts and change their boundaries.

In the case of *Wilson v. Crews*, 34 So.2d 114, the court, in interpreting the provisions of Art. V, § 21, 1885 State Const., as amended in 1944, which is identical to, and appears today as, Art. V, § 11(1), 1968 State Const., said that the legislature was vested with exclusive power to determine by special act that there should be no district in a county, or to divide it into and establish any number of districts not to exceed a maximum of five and to fix or change boundaries of, or abolish any one or more existing districts, to become effective upon approval by the electorate at the next ensuing general election.

In AGO 053-17, Jan. 29, 1953, Biennial Report of the Attorney General, 1953-1954, p. 41, involving the question of whether or not the approval at referendum elections in Alachua, Bay, Highlands, Holmes and Lake Counties of special acts abolishing all justice of peace districts also abolished the offices of justice of peace and constable, it was said,

Assuming that these acts and the referendums conducted in accordance with them were regular in all respects, it is my opinion that the offices of justice of peace and constable were abolished on the dates designated in the pertinent legislative acts for the abolishment of the districts, that there were therefore no offices in existence which could be filled by those elected justice of peace and constable in the affected counties at the 1952 general election, that commissions issued to those persons who were elected to offices which no longer exist have no legal effect, and that any fees paid to you by such persons for their commissions should be returned.

The case of *County of Brevard v. Harland*, 102 So.2d 137, involving a constable's claim to office after the abolishment of a district is in accord with AGO 053-17, mentioned above.

It is therefore my opinion that the legislature may abolish any one or more, or all, justice of the peace districts in a county by special act enacted at any time it is in session, and when approved by the electorate the office of justice of the peace and the office of constable in the abolished district or districts are *ipso facto* abolished. I therefore affirm the position taken in AGO 053-17, as related above, and your first question is answered in the affirmative.

## AS TO QUESTION 2:

The provisions of Art. V, § 21, 1885 State Const., as amended, which is presently Art. V, § 11(1), 1968 State Const., completely revised the fundamental law governing justice of the peace districts as it existed prior to 1944, and the Fla. Sup. Ct. in *Wilson v. Crews*, *supra*, stated that the overall effect of these changes was

... to vest in the Legislature the exclusive power to determine by Special Act at any time either that there be no District in

the county or divide it into and establish any number of Districts not to exceed the prescribed maximum of five; *to fix or change boundaries* of or abolish any District existing in the county at the time of passage of the required Special Act, whether such Districts have been established prior or subsequent to the adoption of the amendment.... (Emphasis supplied.)

It is my opinion that the abolishment of one or more districts, which is less than the maximum of five or the number operating in a county, would not *per se* have any effect upon the remaining districts or the justice of the peace and constable of the remaining districts. However, inasmuch as the legislature is empowered to fix or change the boundaries, I suggest that any special act abolishing a district or districts, less than the sum total operating and in existence, should provide for the proper realignment or apportionment of the abolished district or districts with the remaining district or districts.

070-53—May 22, 1970

#### COUNTY GOVERNMENT

##### REAPPORTIONMENT OF COUNTY COMMISSIONERS' DISTRICTS—ART. VIII, § 1(e), STATE CONST., § 124.01(3), F. S.

To: James C. Fountain, County Attorney, Moore Haven

#### QUESTION:

May the board of county commissioners be authorized to redistrict the county commissioners' districts in an even-numbered year if they have failed to do so in an odd-numbered year?

Under Art. VIII, § 5, of the State Const. of 1885, the board of county commissioners was authorized to redistrict "from time to time" and § 124.01(3), F. S. limits such redistricting to odd-numbered years. The 1968 State Const., Art. VIII, § 1(e), provides that the board *shall* redistrict after each decennial census. It also provides that all laws in effect at the time of its adoption, "to the extent not inconsistent with it, shall remain in force until they expire by their terms or are repealed." Article XII, § 6(a), State Const., 1968. Section 124.01, F. S., is not inconsistent with Art. VIII, § 1(e), State Const.; thus, under the 1968 State Const., as well as the 1885 State Const., redistricting should be undertaken in the odd-numbered year immediately following the completion of the decennial census.

In sum, under the 1885 constitutional and statutory provisions in question, the board could not have redistricted except in an odd-numbered year; and under the 1968 constitutional provision the board is required to redistrict following the 1970 decennial census and every ten years thereafter. Therefore, unless and until otherwise determined by a court of competent jurisdiction, the board is not authorized to redistrict until 1971 following the completion of the 1970 census.

070-54—May 22, 1970

#### TAXATION

##### HOMESTEAD EXEMPTION—DUPLEX, UNDIVIDED ONE HALF INTEREST

To: James W. Bass, Tax Assessor, Fort Pierce



## QUESTION:

Is each individual owner of an undivided one half interest in the entire parcel entitled to a full \$5,000 homestead exemption?

The question is answered in the affirmative by reasoning stated in several earlier opinions of this office, AGO's 055-85 and 055-319, Apr. 25, 1955 and Dec. 5, 1955, Biennial Report of the Attorney General, 1955-1956, pp. 113 and 411, 063-29, Mar. 13, 1963, Biennial Report of the Attorney General, 1963-1964, p. 43 and 069-38 of this publication, subject to the qualification stated in Art. VII, § 6(b), State Const., 1968, that "no exemption shall exceed the value of the real estate assessable to the owner . . . ."

Article VII, § 6, State Const., 1968, expressly provides that "the real estate may be held . . . jointly," and states a limitation of "not more than one exemption . . . to any residential unit." (Emphasis supplied.) The latter language appears to provide authority for the exemption of each residential unit, as opposed to the former provision for one exemption for each dwelling house. See, *Overstreet v. Tubin*, Fla. 1951, 53 So.2d 913; *Ammerman v. Markham*, Fla. 1969, 222 So.2d 423.

070-55—May 22, 1970

## COUNTY GOVERNMENT

REPEAL OR AMENDMENT OF LOCAL LAWS BY COUNTY  
ORDINANCE UNDER ART. VIII, § 6(d),  
STATE CONST.

To: *Carter A. Bradford, County Attorney, Orlando*

## STATEMENT OF FACTS:

A special regulatory act provides that the act shall be effective in the area of the county outside the incorporated municipalities and within such municipalities in the county as may elect to come within the terms of the act. Provision is made for the county to reject a municipality's application for regulation or, if accepted, to discontinue municipal regulation at any time upon its own initiative or at the request of the municipality.

## QUESTIONS:

1. May such a special act be amended or repealed by county ordinance,
  - a. If no municipality has ever elected to come within the terms of the act? *or*
  - b. If a municipality has elected to accept regulation under the act?
2. Is a general law of local application—commonly known as a population act—subject to repeal or amendment by county ordinance?
3. May an amendment inconsistent with general law be adopted by county ordinance to change a special and local law that, as preexisting,
  - a. Is consistent with general law? *or*
  - b. Is inconsistent with general law?

Article VIII, § 6(d) of State Const., is one of several provisions of the 1968 State Const. granting legislative autonomy to counties—the so-called "home rule" provisions. It provides that: "local laws relating

only to unincorporated areas of a county on the effective date of this article may be amended or repealed by county ordinance."

In AGO 069-99, of this publication, it was said that the purpose of Art. VIII, § 6(d), State Const., was to provide a simple method of clearing the statute books of archaic legislation, enabling the counties to perform local governmental and public functions in their unincorporated areas that may now be carried out under county ordinances duly enacted under the authority of the broad home rule provisions of Art. VIII—together with the implementing statute, Ch. 69-234, Laws of Florida[§ § 125.65 and 125.69, F. S.], (as to noncharter counties) and avoiding the trouble and expense of special legislative acts for this purpose. The precise holding in that opinion was that § 6(d), was intended to apply to laws that were special as well as local and that it took precedence over Art. VIII, § 1(f), State Const., prohibiting non-charter counties from enacting ordinances inconsistent with special laws, insofar as preexisting special and local laws relating only to the unincorporated areas of a county were concerned.

In answer to question 1, it seems clear that a special act authorizing the board of county commissioners to regulate a particular trade or industry in the municipalities as well as in the unincorporated areas of the county is not one "relating only to" the unincorporated areas, in the common understanding of the words "relating to," as meaning "pertaining to," "having reference to." See Vol. 36A, Words & Phrases, Perm. Ed., "relating to." In order to interpret Art. VIII, § 6(d), State Const., as authorizing the repeal or amendment of such a special act, it would have to be found that the words "relating only to" were intended to mean "operative only in," and that the intention was to authorize repeal or amendment of such an act if it was, in fact, on the effective date of said Article, operative only in the unincorporated areas of the county—even though potentially operative in the incorporated areas as well. Only when so interpreted can the plain terms of such an act be nullified.

It is a well-settled rule of constitutional construction that the words and terms of a constitution are to be given their most usual and obvious meaning unless the context in which they are used suggests that they have been used in a technical sense. "It must be very plain, nay absolutely certain, that the people did not intend what the language they had employed in its natural signification imports before a court should feel at liberty to depart from the plain meaning of a constitutional provision." *City of Jacksonville v. Continental Can Co.*, 1933, 113 Fla. 168, 151 So. 488.

As noted above, the purpose of Art. VIII, § 6(d), State Const., is to assist in the orderly transition of the counties to their new home rule status without having to go to the trouble and expense of special legislative acts to repeal or amend preexisting statutes concerning purely local matters that the counties are now able to handle on their own by county ordinance. It is apodictic that the language used in a statute or constitution must have been intended to achieve the purpose of the particular provision. This is particularly true of constitutions which, it has been said, "import the utmost discrimination in the use of language," so that "that which the words declare is the meaning of the instrument." *City of Jacksonville v. Continental Can Co.*, 1933, 113 Fla. 168, 151 So. 488, 490. Therefore, the limitation to "local laws relating only to unincorporated areas of a county" effectively prevents the repeal or amendment by county ordinance of a special act applicable *throughout* the county.

The natural significance of the quoted language appears also to prevent the repeal of a special act that "pertains to"—and is potentially

applicable to—the *incorporated* areas of the county as well as the unincorporated areas thereof. Nothing in the home rule amendment, Art. VIII, State Const., suggests that it should be given any other construction. On the other hand, it seems that a regulatory act that may be adopted by the municipalities in the county should not be repealable by county ordinance. For example, Ch. 67-1828, Laws of Florida, authorizing the board of county commissioners of Orange County to adopt a building code and promulgate rules and regulations for the licensing of contractors and others in the building trade, contains certain limitations upon, and exemptions from, the regulations that the board is authorized to adopt under the act. Even though the municipalities in Orange County have no absolute right to be regulated by the county under this act, they are at least potential beneficiaries of its provisions and, as such, appear to have a substantial interest, if not a right, in having the limitations and exemptions provided by the legislature remain as they were until changed by another legislative act, in which they might have some say, instead of by county ordinance.

When considered in the light of the purpose and intent of Art. VIII, § 6(d), State Const.,—as a limited delegation of power to amend or repeal by county ordinance a special and local act of purely local, i.e., county, concern—and the usual rule of statutory and constitutional construction that any doubt as to the extent of a grant of power “should be resolved against the county, district, or municipality asserting the power,” *Williams v. Town of Dunnellon*, Fla. 1936, 169 So. 631, it is my view that a county should not attempt to repeal or amend by county ordinance any special and local act that is not clearly within the terms of § 6(d); and, in my opinion, a special act such as that described in your first question is not clearly within its intendment. Question 1 is, therefore, answered in the negative.

The answer to question 2 is also in the negative. Although it was stated in AGO 069-99, as mentioned above, that local law as used in Art. VIII, § 6(d), State Const., included an act that was special as well as local, no basis for concluding that local law may be held to include a general law of local application can be found. Moreover, the reasoning and conclusion in my answer to your first question is equally applicable here: A population act is potentially applicable to all counties that, by population increase or decrease, could fall within the population bracket. It therefore “pertains to” more than the unincorporated area of a single county.

Question 3 is answered in the negative, also. As noted, the purpose and intent of Art. VIII, § 6(d), State Const., is to authorize the counties to repeal or amend special and local laws concerning matters that are strictly local in nature and subject to the ordinance-making power under home rule. A general law is, presumably, of statewide concern or serves a state purpose. This being so, I find no basis for concluding that “local law” as used in § 6(d), should be interpreted as including a general law. In the absence of any authority under § 6(d), the express provisions of Art. VIII prohibiting the adoption of ordinances inconsistent with general law—and, as to noncharter counties, with special law also—must be given effect.

070-56—May 26, 1970

#### FRANCHISE FEE

#### STATE LIABILITY WHEN PART OF MUNICIPAL PUBLIC UTILITY CHARGE

To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee

## STATEMENT OF FACT:

Reference was made by the comptroller to a franchise fee imposed by the City of Fort Lauderdale on Southern Bell Telephone Company by ordinance under the municipal charter, Ch. 24514, Laws of Florida, 1947, which fee is measured by a percentage of service charges and which, by specific regulation of the public service commission, may be indicated on the company's statements to consumers as an increase in the charge for telephone services.

## QUESTION:

Can the office of comptroller authorize payment of telephone bills containing "franchise fee" when the ultimate consumer is a state agency or state department?

Your question is answered in the affirmative because, in the circumstances described, the consumer, whether public or private, is paying only for service at the legally permitted rate. I agree, accordingly, with the conclusion stated in your accompanying memorandum and enclosures, that there appears to be "no statutory or constitutional prohibition preventing the state or its agencies from paying for telephone service at a state approved rate."

The municipal exaction is in this case clearly imposed upon the company, the franchise holder, and therefore presents no basis for invoking the unquestioned doctrines of governmental immunity on behalf of a consumer agency. *City of St. Petersburg v. Carter*, Fla. 1949, 39 So.2d 804. This conclusion is supported by the analogous rationale stated in an earlier opinion of this office finding that taxes may be passed on to a consumer "not as taxes separate and apart from the cost price . . . but as a part of such price" and "invoices or bookkeeping cannot change the fact that the purchaser is paying the sales prices fixed by the seller and nothing more or less." Attorney General Opinion 059-116, June 18, 1959, Biennial Report of the Attorney General 1959-1960, p. 180. Authorization for rate increase by the method here employed also appears to be in accord with the general law in this field by which such exactions as franchise fees are regarded as operating expenses which may certainly affect regulation and justify rate increases. 73 C.J.S. 1042, *Public Utilities*, § 25.

Payment of the bill described for services at a rate including the franchise fee appears to be legally required under current law.

This opinion, however, only expresses the current status of the law and not what the law should be. I share your obvious concern that a fee imposed upon a public utility for the privilege of operating as a monopoly should be directly paid by the consumer and not by the utilities' shareholders who are the beneficiaries of the monopolistic position. This anomaly is one which should be carefully examined by the legislature.

070-57—May 26, 1970

## TAXATION

ASSESSMENTS, TAX ROLL—CHANGE OF  
NAME—DUTY OF TAX ASSESSOR

To: Earl R. Adams, Clerk of the Circuit Court, Key West; Joe Allen, Tax Assessor, Key West



## QUESTIONS:

1. If a final divorce decree restores to a woman her name prior to marriage, is this authority for the tax assessor to change the name on the tax roll for a parcel of land owned by her even though the name on the recorded deed is not the name she is allowed to resume under the divorce decree?

2. May the tax assessor change a name on the tax roll when a return he receives shows the woman has married and her married name is different from that on the deed which is recorded and carried on the tax roll?

3. If the woman's name may be changed, how does the clerk of the circuit court comply with § 194.16[§ 197.495], F. S.?

Your first and second questions are answered in the affirmative. The affirmative answer to the first question is based on the assumption that in the situation raised in this question, the woman has made a return in her restored name.

Generally, there are two ways a person may change his name. One may proceed under § 62.031, F. S. (formerly § 69.02, renumbered by § 17, Ch. 67-254, Laws of Florida). This statute prescribes the manner in which the change may be accomplished. The second way is for the person, without any legal proceedings, to assume the desired name. The latter way is perfectly legal providing no fraud is involved. 21 Fla. Jur., *Names*, § 6, p. 240.

Section 193.251, F. S., states: "The county tax assessor shall . . . where land has not been returned for assessment . . . assess such land . . . in the name of the last known owner . . ." This provision appears to mean the present name of the owner should be used as that is his name. A fortiori, the tax assessor would be able to use the new name where a return is made in such new name. This conclusion is supported by *Amos v. Jacksonville Realty and Mortgage Co.*, 81 So. 524.

In addition, § 193.071, F. S., *inter alia*, charges the county tax assessor to *ascertain the names* of all taxable persons in his county and their taxable real estate and make out an assessment roll on all such property.

When the tax assessor receives a return from the woman in a different name, it would appear to be an election on her part to assume that name. Therefore, the tax assessor has the authority and duty to make the change on the tax roll pursuant to §§ 193.251 and 193.071, F. S.

In reference to your third question, § 194.16, F. S., 1967 (now § 197.495 as renumbered by Ch. 69-55, Laws of Florida), has no bearing on questions 1 and 2 unless there has been a tax sale for prior years' taxes, the tax certificate has been held for 2 or more years, and the holder thereof acts to have the land advertised for sale (§ 197.490, F. S., 1969). If this occurs, the procedure for the clerk to follow in order to comply with § 194.16[§ 197.495], F. S., appears to remain unaffected. Said section provides a form of notice to be used for "NOTICE OF APPLICATION FOR TAX DEED" and provides that said notice shall be in substantially the form set out in the section. The form provides space, *inter alia*, for a "Description of Property" and "Name in which assessed."

Strict compliance with the statute would appear to require that the clerk of the circuit court literally designate in the notice of application for tax deed the name in which the property was assessed regardless of the subsequent change in name.

In the event the notice does not reach the owner due to the name

change or any other reason, § 197.505(1), F. S., states that such failure "... shall not affect the validity of the tax deed issued pursuant to such notice."

In consideration of the foregoing, the tax assessor has the authority and duty to make the name change on the tax roll in the situations you present in questions 1 and 2, and the clerk's procedure, when required, under § 194.16[§ 197.495], F. S., is not changed.

070-58—May 28, 1970

# RECORDING OF SUBDIVISION PLATS

## CONDOMINIUMS—COMPLIANCE WITH LOCAL REGULATIONS— § 711.09(2), F. S., CH. 69-1550, LAWS OF FLORIDA

To: *Ralph B. Wilson, County Attorney, Fort Pierce*

### QUESTION:

May the clerk of the circuit court refuse to record a condominium plat of land lying in the unincorporated area of the county unless and until it is approved by the board of county commissioners?

Your question stems from a possible conflict between the Condominium Act, Ch. 711, F. S., and Ch. 69-1550, Laws of Florida.

Section 711.08, F. S., provides for the creation of a condominium form of ownership by the recording of a "declaration" executed by all persons having record title to the land. The declaration is to be accompanied by a "survey of the land and a graphic description of the improvements in which units are located and a plot plan thereof..." The paragraph that generates the conflict is subsection (2) of section 711.09, F. S., which reads as follows: "Graphic descriptions of improvements... when accompanied by the certificate of an architect... shall be recorded as a part of a declaration without approval of any public body or officer."

Section 2 of Ch. 69-1550, Laws of Florida, authorizes the board of county commissioners of St. Lucie County to prescribe street widths, building lines, drainage and sewage requirements, and the like, to be followed by subdividers of parcels of land in the unincorporated areas of the county, and requires a subdivision plat to be approved by the board before it is entitled to recordation either as an independent instrument or as an attachment to another instrument. It provides also that "in the case of condominium plats, streets designated as 'private street' shall not be dedicated to the public." Section 4(7), Ch. 69-1550, Laws of Florida.

I see no conflict between the provisions of the special act and § 711.09(2), F. S. The "graphic description of the improvements in which units are located" refers to the *buildings* which are proposed to be constructed for individual ownership by the members of the condominium. This is made clear by the definitions of "condominium" and "unit" made by § 711.03(7) and (13), F. S. The substitution of the architect's certificate for the approval of the building by a public body or officer was clearly intended to be only for the purpose of recordation of the declaration and not for the purpose of bypassing the local building and zoning codes and other applicable regulations. Here, again, such an intention is made clear by another provision of the Condominium Act, § 711.21, F. S., providing that all laws, ordinances and regulations respecting the "use, or location, placement or construction

of buildings or other improvements" shall apply equally to condominiums as to other similar buildings and improvements not condominium-owned.

The fact that there is no conflict between § 711.09(2), F. S., and Ch. 69-1550, Laws of Florida, does not completely answer your question. In view of the command of § 711.21, F. S., as well as general principles of law, that condominiums are entitled to the same treatment as other similar improvements, a condominium complex that is proposed to be constructed within the confines of a small area that has already been graded and improved with streets and sewers and the like and that has none of the aspects of a subdivision appears to be entitled to the same treatment as any other apartment house project; and in this situation it seems that the "plot plan" could be filed along with the declaration without first being approved as a "subdivision plat" as required by Ch. 69-1550, *supra*. If, however, the "plot plan" is of such magnitude and of such nature as to constitute, in fact, a subdivision plat as defined in and contemplated by Ch. 69-1550, then it would, of course, have to be approved as required by Ch. 69-1550 before it would be entitled to recordation as an attachment to the declaration.

070-59—June 2, 1970

#### COURTS

##### JURY VENIRE—PROCEDURE FOR SELECTION— DEPOSIT FOR JURY FEES

To: *Virgil B. Conkling, President, Florida County Judges' Association, Titusville*

##### QUESTIONS:

1. Is there a conflict in the application of §§ 40.38 and 51.011, F. S.?
2. In the event there is a conflict, which shall the county judges follow in counties of over 120,000 population?
3. Should all cases handled under § 51.011, F. S., be governed solely by this statute with reference to juries?
4. In the event a jury is drawn in accordance with § 40.38, F. S., should the county judge require the deposit provided for in § 51.011, F. S.?

##### AS TO QUESTION 1:

There does not appear to be a conflict between the application of §§ 40.38 and 51.011, F. S.

Section 40.38, F. S., as amended by Ch. 69-1737, Laws of Florida, permits county judges in counties having a population in excess of 120,000 and a jury commission as provided for in § 40.09, F. S., to draw from the jury box the names of such number of persons as they shall deem necessary or expedient for a jury venire. The drawing of a jury venire by county judges in those counties under 120,000 population is generally governed by the provisions of Ch. 41, F. S.

The provisions of § 51.011(3), F. S., pertaining to a jury are applicable only to those actions specified by statute or rule, such as the enforcement of statutory liens as contained in § 85.011(5)(a), F. S., and for forcible entry and unlawful detainer as contained in § 82.03, F. S., and actions by landlords for the removal of tenants as provided for in § 83.21, F. S.

When a jury trial is authorized by law, Ch. 51, F. S., requires that a jury in attendance must be used when proceeding under summary

procedure provisions without cost to a demanding party. Only when there is no jury in attendance and a special venire is summoned may a demanding party be required to deposit sufficient money to pay the jury fees. Question 1 is, therefore, answered in the negative.

#### AS TO QUESTION 2:

In those counties with a population in excess of 120,000, the county judge should follow the provisions of Ch. 40, F. S., in drawing a jury venire except when proceeding under the summary procedure provisions of Ch. 51, F. S. Question 2 is answered accordingly.

#### AS TO QUESTION 3:

Cases handled under Ch. 51, F. S., should be governed by § 51.011(3), F. S., pertaining to juries. This subsection assures an immediate jury trial when requested. In those situations wherein a jury is in attendance, regardless of whether the venire was drawn under Ch. 40 or Ch. 41, F. S., it should be used under the summary procedure provisions of Ch. 51, F. S. However, if there is no jury in attendance at the close of pleading or the time of demand for jury trial, the court shall order a special venire to be summoned immediately, and the demanding party shall deposit sufficient money with the clerk to pay the jury fees which shall be taxed as costs if he prevails. Question 3 is answered in the affirmative.

#### AS TO QUESTION 4:

Rule 7.150 of Summary Claims Procedure Rules provides that "Deposit for payment of jurors, taxation of costs of the jury, selection, issuance of venire, summons and pay of jurors shall be as provided by law." Section 51.011(3), F. S., requires the demanding party to deposit sufficient money with the clerk to pay jury fees only when there is no jury in attendance and a special venire is summoned. Therefore, if a jury is drawn under § 40.38, F. S., and is in attendance at the close of pleading or the time of demand for jury trial, it should be used and no deposit required.

A party demanding a jury trial in a civil action may be required, under § 40.25, F. S., to deposit an amount sufficient to cover the costs when the court or judge is on vacation and a jury is specially summoned to try any issue of facts. Question 4 is answered in the negative.

070-60—June 2, 1970

#### STATE OFFICERS AND EMPLOYEES

#### PER DIEM—CONSTRUCTION OF TERMS "PUBLIC OFFICERS AND AGENCY HEADS" AND "PUBLIC AGENCY" AS THEY RELATE TO EXECUTIVE DIRECTOR OF COMMISSION ON MARINE SCIENCES AND TECHNOLOGY

To: Ernest Ellison, Auditor General, Tallahassee

#### QUESTION:

May the executive director of the commission on marine sciences and technology legally be reimbursed at the public officer or agency head rate of \$20 per diem while traveling on official business?

Section 369.05, F. S., provides for an executive director as follows:

The commission is hereby granted the power to appoint an executive director who shall, subject to the direction of the



commission, have general charge of the work of the commission. He shall serve at the pleasure of the commission. Compensation of the executive director shall be fixed by the commission. The director shall be entitled to be reimbursed for his actual and necessary expenses incurred in the performance of his official duties to the same extent as other state employees. The commission shall have the right to remove the executive director with or without cause, and the director, while in charge of the work of the commission, shall at all times be subject to the authority and direction of the commission.

Pursuant to § 112.061(6)(c), F. S., the per diem rate for public officers and agency heads is up to \$20 while traveling on official business.

The definition of public officers and agency heads in § 112.061(2)(b), F. S., confines that class of individual to the highest policymaking authority of a public agency. Public agency is defined in § 112.061(2)(a), F. S. as "any . . . agency, . . . board . . . commission, [or] authority . . . created pursuant to law."

The commission on marine sciences and technology is the highest policymaking authority of the public agency as outlined in § 369.06, F. S.

As § 369.05, F. S., provides that the executive director shall be appointed by the commission, which commission shall have the right to remove him with or without cause and who shall at all times be subject to the authority and direction of the commission and who shall be entitled to reimbursement to actual and necessary expenses incurred in the performance of his official duties to the same extent as other state employees, the entitlement of the executive director for reimbursement would be at the same rate as "all other travelers" in accordance with the provisions of § 112.061(6)(d), F. S., which reads as follows:

(6) RATES OF PER DIEM AND SUBSISTENCE ALLOWANCE.—For purposes of reimbursement rates and methods of calculation, per diem and subsistence allowances are divided into the following groups, and maximum rates to be determined by the agency head:

\* \* \* \* \*

(d) All other travelers may be allowed up to seventeen dollars per diem.

Your question is answered in the negative.

070-61—June 3, 1970

#### STATE OFFICERS AND EMPLOYEES

#### TRAVEL EXPENSES—TRAVEL STATUS FOR MORE THAN THIRTY DAYS—CONSTRUCTION OF § 112.061(4)(b), F. S.

To: *Floyd T. Christian, Commissioner of Education, Tallahassee*

#### QUESTION:

Does § 112.061(4)(b), F. S., require the approval of the department of Administration in those cases in which the state employee is in a travel status for thirty or more days but is not temporarily assigned to any one city or town for a period in excess of thirty days?

Under § 112.061(4)(b), F. S., an assignment to duty in one city for as much as thirty days has the effect of making such city the "official headquarters" of the employee, so that, in practical effect, he loses his travel status for the remainder of his tour of duty in such city unless approval for its continuance is obtained from the department of administration. Thus, the situation described by you would not be within the intendment of the statute. Your question is answered in the negative.

070-62—June 8, 1970

#### MUNICIPALITIES

#### REFERENDUM VOTE ON PROPOSED PUBLIC IMPROVEMENTS—BINDING EFFECT WHEN REFERENDUM NOT LEGAL REQUIREMENT

To: *Hugh S. Glickstein, City Attorney, City of Lauderdale Lakes, Hollywood*

#### QUESTION:

When a municipality submits a proposition to the electorate in an "advisory" referendum without being required to do so by statute or charter, is the municipality permitted to vary the terms of the proposition as approved by the electorate?

No decision of our courts has been found with respect to the binding effect of an *approval* by the electorate of a proposition that the legislative body was not *required* to submit to the voters. Cf. *City of Miami Beach v. Crandon*, Fla. 1948, 35 So.2d 285, in which the court declined to answer a similar question as "premature." Decisions of courts of other jurisdictions indicate that in the absence of a statutory or charter provision expressly providing for "advisory" or "declaration of policy" referenda and committing the governing body to carry out such policy if approved by the electorate, such an advisory referendum is not binding upon the governing body. See *Muehring v. School District No. 31 of Stearns County, Minn.* 1947, 28 N.W.2d 655, and cases and text authorities cited; *Silberman v. Katz*, 1967, 283 N.Y.S.2d 895, aff'd 284 N.Y.S.2d 836. Also see *Farley v. Healey*, Cal. 1967, 431 P.2d 650, 652, in which the decision turned on a charter provision of the City of San Francisco authorizing a "declaration of policy" referendum and requiring the board of supervisors to enact an ordinance to carry such policy into effect if approved by the electorate.

While the question of whether or not to construct a city hall has been said to be legislative in character and thus properly the subject of initiative or referendum, see *Scott v. City of Orlando*, Fla.App. 1965, 173 So.2d 501, the fact remains that the city's charter gave to the city council the full authority to decide this question without referring it to the electorate for a final decision; and it seems that a referendum vote for advisory purposes only would not constitute a *legal* bar to the council's varying the terms of the proposition upon which the advice of the electorate was sought. See *McQuillin, Municipal Corporations* § 16.70, p. 255, stating that "...in the absence of a statutory or constitutional mandate restricting such procedure, a municipal council may enact an ordinance even though an essentially identical ordinance, previously passed by the council, was rejected in a referendum election."

Accordingly, unless it is determined otherwise by a court of competent jurisdiction, your question is answered in the affirmative.

070-63—June 10, 1970

## CONTRACTS

LEASE OF REAL ESTATE—EFFECT OF "RIGHT TO TERMINATE"  
CLAUSE FOR NEW AGREEMENT RENEWING

To: *Chester F. Blakemore, Executive Director, Department of General Services, Tallahassee*

## QUESTION:

Can the lessor, being required to execute a new agreement which includes the *right to terminate* clause, refuse to honor the terms and conditions for the extension or renewal period previously granted in the lease contract?

Your question appears clearly to contemplate the execution of a new agreement with the addition of a "right to terminate" clause. Such action appears tantamount to a new offer to contract which, in turn, would permit the lessor the option of accepting or rejecting the same or proposing other terms and conditions to his liking. Your question is answered in the affirmative.

070-64—June 10, 1970

## CONTRACTS

REQUIRING WAIVER OF LIABILITY FOR NEGLIGENCE  
BY AGENTS OF THE STATE

To: *James A. Bax, Secretary, Department of Health and Rehabilitative Services, Tallahassee*

## QUESTION:

Can the department of health and rehabilitative services require its employees to waive the state's liability under § 768.15, F. S., for damages that may in the future result from the negligent acts of its agents or employees, as a condition to being assigned a residence on the grounds of a state institution?

As stated in 23 Fla.Jur. *Negligence*, § 7, a contract exempting a person from liability for future negligent acts is subject to the objection that it tends to induce a want of care. 38 Am.Jur. *Negligence*, § 8. Consequently, such agreements may be declared invalid on the grounds of public policy. *Western Union Telegraph Co. v. Milton*, 53 Fla. 484, 43 So. 495, holding that telegraph companies cannot exempt themselves from liability for damages caused by their own negligence or that of their servants. It has been held in several recent cases that it is a general principle of law that contracts of indemnification which attempt to relieve a party of his own negligence are not looked upon with favor. *Nat Harrison Associates, Inc. v. Florida Power and Light Co.*, 162 So.2d 298 (Dist. Ct. App. 3 1964).

Common carriers cannot by contract protect themselves from consequences of their own negligence, and in some instances statutes expressly declare invalid certain contracts limiting liability for negligence.

This opinion does not touch upon the waiver of immunity provision, Ch. 69-116, Laws of Florida (§ 768.15, F. S.), which provides that the state for itself and its counties, agencies, and instrumentalities, waives immunity for liability for the torts of officers, employees, or servants committed in the state, which act is repealed July 1, 1970, by Ch. 69-357, Laws of Florida.

Your question, therefore, is answered in the negative.

070-65—June 10, 1970

## TAXATION

EXEMPT STATUS OF MUNICIPALLY-OWNED  
PROPERTY LEASED FOR OPERATION OF  
PRIVATE BUSINESS*To: Clark Maxwell, Sr., Tax Assessor, Titusville*

## STATEMENT OF FACTS:

1. The City of Titusville leases on city property and to an individual the use of property for operation of a mobile home park, and spaces are rented to individual persons at a fee set by the person leasing the property from the city. The lease runs for a period of ten years, with a monthly rental being paid to the City of Titusville for such lease.

2. In the case of the City of Melbourne, they have twenty acres of land which they have zoned as industrial park and they lease individual plots to various industrial manufacturers: a concrete block maker, a general contractor and builder, etc. These people pay the City of Melbourne a monthly rental in lieu of taxes for the use of this property. They are operating as legal retail industrial concerns.

3. The City of Melbourne by resolution has formed the Cape Kennedy Regional Airport Authority, which is comprised of two members of the city council and three individuals. This authority is granted the right of full operation and maintenance of the Cape Kennedy Regional Airport. The City of Melbourne, through the airport authority, is leasing land and buildings to private industry, namely a fruit-canning plant and an electronics plant, and now to Radiation, Inc., who will build a \$2,000,000. building on leased property.

## QUESTION:

Are the municipally-owned properties described in the statement of facts, when used as set forth in said statement, exempt from taxation pursuant to Art. VII, § 3 of the 1968 State Const.?

Article VII, § 3(a), provides in part: "All property owned by a municipality and *used exclusively by it* for municipal or public purposes shall be exempt from taxation. . . ." (Emphasis supplied.)

Attorney General's Opinion 070-3 of this publication, treats generally a related point involving exemption under § 192.62[§ 196.25], F. S., of municipally-owned land leased to a nonprofit corporation. The opinion expressly reserves the question of whether interpretations of the tax exemption provisions of the 1885 State Constitution would be upheld under the new and somewhat different provisions of the 1968 State Constitution—as to which no opinion is expressed. My construction of the statutes and decisions remains unaltered, subject however to the limitation imposed on such exemptions by the constitutional language hereinafter discussed.

I conclude now that the provisions of Art. VII, § 3, State Const., which appear to be both self-executing and mandatory, clearly limit municipal property tax exemption by requiring in addition to municipal ownership and municipal or public use that such property shall be *used exclusively by the municipal owner*. Exclusively, by ordinary definition, means solely or alone, to the exclusion of others. *Lee v. Gulf Oil Corp.*, 148 Fla. 612, 4 So.2d 868. To the extent, therefore, that said § 3(a) imposes the additional requirement of exclusive use by a municipal owner, it constitutes a prospective qualification of principles formerly controlling exemption of municipal property from ad valorem taxes. See



Daytona Beach Racing and Rec. Fac. Dist. v. Paul, Fla. 1965, 179 So.2d 349; Art. IX, §1, Art. XVI, §16, State Const., 1885; §192.06[§196.191], F. S. Also significant is the omission of municipal and public purposes from the final clause in Art. VII, §3(a), State Const., permitting but not requiring legislative exemption of "such portions of property as are used predominantly for educational, literary, scientific, religious, or charitable purposes."

Insofar as the property described is used by private parties for industrial, commercial, or residential purposes, you may properly find that it is beyond the terms of the constitutional exemption. Even assuming that the terms "municipal or public purposes" should still be accorded the broad scope indicated by cases cited in my earlier opinion, and further assuming that Art. VII, §3(a), State Const., can be construed to encompass use either directly by the municipality itself or indirectly through an agent acting as a municipal instrumentality, I believe that property owned by a municipality and used by private parties for residential, industrial, or commercial purposes could not qualify for exemption under that section unless such private parties are in fact using the property solely as agents of the municipal owner for a municipal or public purpose. This necessarily follows, I believe, from the express requirement of Art. VII, §3(a), that such property must be used exclusively by its municipal owner.

Although a municipal lessor's remainder interest in leased property may be regarded as property used exclusively by it within the constitutional terms, the use of leasehold interests in such property by private parties, not acting exclusively as municipal agents would, under the constitutional limitations, apparently preclude any exemption except when separate assessment of remainder and leasehold interests may be authorized by statute. *Bancroft Investment Co. v. City of Jacksonville*, 157 Fla. 546, 27 So.2d 162, 167; AGO 065-46, May 17, 1965, Biennial Report of the Attorney General, 1965-1966, p. 63. See also §7, Ch. 69-104, Laws of Florida(§159.31, F. S.):

...[T]he local agency shall not be required to pay any taxes on any project or any other property owned by the local agency under the provisions of this act or upon the income therefrom.... Nothing in this section, however, shall be construed as exempting from taxation or assessments the leasehold interest of any lessee in any project or any other property or interest owned by any lessee, and if any project or any part thereof shall be occupied or operated by any private corporation, association, partnership, or person pursuant to any contract or lease with the local agency, the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately[-]owned property.

Your inquiry does not question the application of this statute or its constitutional authorization under Art. VII, §10, State Const., 1968, and no definitive consideration is given to those provisions beyond that already stated in AGO 069-30, of this publication.

My remarks are directed to, and limited to, properties of municipalities and not public bodies generally. Until such time as there may be a contrary judicial or legislative expression relative to the constitutional change, or additional facts may show that municipally-owned property in such a situation is in fact used exclusively by it for municipal or public purposes, your question, for the reasons stated, is answered in the negative.

070-66—June 16, 1970

PUBLIC OFFICERS  
SUSPENSION AND REMOVAL FROM OFFICE—  
EFFECT OF SUBSEQUENT JUDICIAL  
ACQUITTAL OF CHARGES ON RECOVERY  
OF BACK SALARY

To: G. S. Goshorn, County Attorney, Titusville

QUESTION:

Is a board of county commissioners authorized or required by law to pay the back salary of a county commissioner who was suspended by the governor and removed by the senate following his indictment on charges of malfeasance in office and who was subsequently tried and acquitted of those charges?

Your question is answered in the negative. While a suspension from office merely prevents the suspended official from performing the duties of his office during the period of the suspension, a removal is different. The senate's concurrence in the governor's recommendation and removal of the official stands as a finding—presumptively correct—that the charges were sufficient, as a matter of law, to justify the suspension and removal of the official. It also stands as an adjudication that the evidence was sufficient to support such charges; and the senate's adjudication in this respect is not subject to review by the courts. 26 Fla.Jur., *Public Officers*, § 90, p. 237; *State ex rel. Hardie v. Coleman*, Fla. 1934, 155 So. 129, 134. Upon a removal, the right to the office has, in effect, been adjudged to have been taken away and forfeited as of the date of the order of suspension—or, at least, the notice thereof. *In re Advisory Opinion to the Governor*, 1893, 31 Fla. 1, 12 So. 114; 26 Fla.Jur., *Public Officers*, § 85, p. 233. The removal results in a vacancy in the office, and the appointee to fill the vacancy is serving in his own right as a *de facto* officer and not in the place of the ousted official. *State ex rel. Hatton v. Joughin*, Fla. 1931, 138 So. 392, 396, 397.

Thus, before an ousted official can claim that he is entitled to the emoluments of an office for the period of his suspension and removal, he must establish that he was wrongfully deprived of his right and title to the office; and this can be done only in a direct proceeding brought in a court of competent jurisdiction for that purpose. *Ball v. State ex rel. Harvey*, Fla. 1933, 146 So. 830 and cases cited. In such proceeding, the sole question before the court is whether the jurisdictional facts upon which the governor's suspension order was based were sufficient, as a matter of law, to support the suspension and removal. 26 Fla.Jur., *Public Officers*, § 91, p. 238; *State ex rel. Hardie v. Coleman*, Fla. 1934, 155 So. 129; *State ex rel. Bridges v. Henry*, 60 Fla. 246, 53 So. 742. If it is found by the court that the official was wrongfully removed from his office, he may recover his salary for the time he was wrongfully prevented from performing its duties unless he is found to have waived his rights by abandoning the office or is otherwise estopped from claiming relief. 43 Am.Jur., *Public Officers*, § 380 and 381, p. 163; *State ex rel. Balma v. Evans*, Fla.App.1959, 107 So.2d 620; *Ball v. State ex rel. Harvey*, *supra*, 146 So. 830.

In the absence of an adjudication by a court of competent jurisdiction that the official in question was wrongfully removed from office and that he is entitled to the emoluments thereof for the balance of the term during which he was suspended and removed, he has no lawful claim to such compensation. Your question is, therefore, answered in the negative.

070-67—June 16, 1970

## TAXATION

EXTENSION OF TAXES ON TAX ROLL IN ASSESSMENT OF CITY  
AND COUNTY TAXES UNDER § 193.63[§ 193.181], F. S.,  
FOR PROPERTY ON WHICH COUNTY OR CITY  
HOLDS TAX CERTIFICATES

To: David L. Reid, Tax Assessor, West Palm Beach

## QUESTIONS:

1. Does the assessor extend the taxes on the municipal roll for the year 1970 when the city holds a certificate for 1969 municipal taxes, but the taxpayer has paid the 1969 county taxes?

2. Does the assessor extend the taxes on the municipal roll where the county holds a certificate for 1969 county taxes, but the taxpayer has paid the 1969 municipal taxes?

3. Does the assessor extend the taxes on the county roll where the city holds a certificate for 1969 municipal taxes, but the taxpayer has paid the 1969 county taxes?

Questions 1 and 3 are answered in the affirmative, and Question 2 in the negative, for reasons stated below.

Chapter 69-54, Laws of Florida (§ § 167.433(4) and 167.435, F. S.), so far as material to these questions, provides that after assessment by the county tax assessor of the taxable property within a municipality, and certification of millage by the municipal governing body, states in part:

Section 6. The county tax assessor shall then extend the tax roll as required under the general laws of this state, indicating thereon the taxes levied by each of the municipalities within the county. . . . (Emphasis supplied.)

Section 12. All taxes levied and assessed under the tax assessment rolls shall . . . be subject to the same rights and privileges of purchase, assignment and redemption, and shall be subject to the same methods of enforcement, by the same officials and shall receive the same disposition. All shall be governed by the general laws relating to county taxes.

These provisions clearly require that municipal taxes assessed thereunder "shall be governed by the general laws relating to county taxes," such as § 193.63[§ 193.181], F. S., and apparently contemplate, as indicated in AGO 070-20, of this publication, a county-municipal tax roll which is for practical purposes a consolidated roll controlled procedurally by statutes formerly applicable to county taxes.

In the absence of a more specific legislative directive, however, the provision of Ch. 69-54, Laws of Florida (§ 167.435, F. S.), that municipal taxes shall be governed by general laws relating to county taxes would not make § 193.63[§ 193.181], F. S., applicable to lands on which taxes have been sold to a city, because it is expressly limited to lands on which taxes have been "sold to the county." Questions 1 and 3, involving situations in which taxes have been sold to a city, therefore present no grounds for application of the mandate of § 193.63[§ 193.181], F. S., against extending taxes, and these questions are answered in the affirmative in favor of extending the taxes.

With reference to Question 2, the quoted portions of Ch. 69-54, Laws of Florida (§ 167.435, F. S.), require the assessor, in extending municipal taxes, to be governed by the general laws relating to county

taxes. Section 193.63[§193.181], F. S., as a general law relating to extension of county taxes, should accordingly be applied to prohibit extending municipal taxes on "lands upon which taxes have been sold to the county." I find no express or implied terms in Ch. 69-54 which would permit the extension of taxes, even municipal millage, contrary to the mandate of §193.63[§193.181], F. S., that assessors "shall not extend the taxes upon such lands," i.e. lands upon which taxes have been sold to the county without regard as to whether the taxes sold to the county included all taxes. In sum, the fact that municipal taxes were paid does not alter the provision of Ch. 69-54 that the assessor, in extending municipal taxes, shall be governed by general laws relating to county taxes, which general laws provide that taxes shall not be extended when the county holds a tax certificate.

070-68—June 16, 1970

#### BEVERAGE LAW

#### LAW ENFORCEMENT OFFICERS—OFF-DUTY EMPLOYMENT AS SECURITY GUARD FOR SUPERMARKETS

To: Roy T. Rhodes, City Attorney, Tallahassee

#### QUESTION:

May a municipal police officer accept a special duty assignment approved by the chief of police to work off-duty hours as a security policeman to detect any violations of laws that might happen on the premises of a supermarket or any similar general grocery store which is also a licensee for the sale of beer and wine for consumption off the premises?

Section 561.25, F. S., prohibits law enforcement officers from engaging in the sale of alcoholic beverages or being employed in connection with the operation of any business licensed under the beverage laws. The intent and purpose sought to be accomplished by this statute is to prohibit law enforcement officers from being connected with licensed premises in such a way as to prevent the officers involved from enforcing the beverage laws in an unbiased and unprejudiced manner.

In AGO 058-16, Jan. 15, 1958, Biennial Report of the Attorney General, 1957-1958, p. 498, it was held that although alcoholic beverages are dispensed at a racetrack, §561.25, F. S., did not prohibit a municipal police officer from accepting employment as a security officer from the racing permit holder, since the sale of alcoholic beverages at the racetrack was a mere incident to the main business of racing.

Supermarkets are primarily and principally grocery stores wherein a customer may leisurely and completely purchase all food items commonly used in the American household. The sale of beer and wine is merely a minor incident to its principal business of selling groceries and is, to a large extent, in the nature of an accommodation to the grocery shopper.

It is therefore my opinion that the sale of beer and wine for consumption off the premises by a supermarket, or any similar general grocery store, that is a mere incident to its principal business of selling groceries would not prohibit a municipal police officer from accepting off-duty work with the store as a general security officer when approved by the officer's supervisors. Your question is answered in the affirmative.



070-69—June 16, 1970

## REGULATION OF COMMERCE

RETAIL INSTALLMENT SALES ACT—APPLICABILITY  
TO MERCHANTS SUBSCRIBING TO "BankAmericard"  
OR "MASTER CHARGE" CREDIT CARD PROGRAMS*To: Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

## QUESTION:

Are participating merchants under "BankAmericard" or "Master Charge" credit card programs required to be licensed under Part II, Ch. 520, F. S. (Retail Installment Sales Act)?

Merchants who participate in the BankAmericard or Master Charge credit card programs fall within the definition of "retail seller" contained in the statute, § 520.31(5), F. S. Under the terms of § 520.32(1), F. S., any retail seller engaged in retail installment transactions, as defined in the act, is required to obtain a license, pay an annual license fee of \$5, and comply with the other applicable provisions of the act. A retail installment transaction is defined in § 520.31(6), F. S., as "a contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract or a revolving account." (Emphasis supplied.)

Under the BankAmericard or Master Charge credit card programs, a sales draft is issued by the merchant covering the sale in question and bearing an assignment of the account or charge to a member bank of BankAmericard or Master Charge, as the case may be. The merchant's name is stamped on the face of the sales draft and the buyer signs it, thereby acknowledging "that he has read the terms on the reverse side and accepted same." The reverse side of the sales draft contains a "Revolving Charge Agreement" between the buyer and the merchant under the terms of which the buyer agrees to the assignment of the account in question to a member bank and also agrees to pay a financing charge in the amount and in the circumstances prescribed by § 520.35, F. S. The agreement on the reverse side of the sales draft conforms in all respects to the description of a "revolving account" contained in § 520.31(8), F. S.

I conclude, therefore, that merchants participating in a BankAmericard or Master Charge credit card program are within the letter of the statute in question; and they appear to be within its spirit and intent, also. The act was adopted under the police power of the state as a general welfare measure, apparently to correct or to forestall abuses in the field of dealer participation in sales made on the installment plan. The fact that the execution of the revolving charge agreement by the buyer and its assignment to a member bank by the merchant appear to be simultaneous transactions, does not make it any the less subject to regulation, nor does it appear to diminish the need therefor insofar as the participating merchants are concerned. Your question is answered in the affirmative.

070-70—June 16, 1970

## REGULATION OF VOCATIONS

PLUMBERS, ELECTRICAL CONTRACTORS—LAWS REGULATING—  
INAPPLICABILITY TO FLORIDA MANUFACTURERS OF  
PREFABRICATED MODULAR OR OTHER FACTORY-  
BUILT HOMES CONTAINING PREINSTALLED  
PLUMBING OR ELECTRICAL FIXTURES

To: James A. Bax, Secretary, Department of Health and Rehabilitative Services, Tallahassee

## QUESTIONS:

1. Is a Florida manufacturer of prefabricated, modular, or other factory-built homes which contain preinstalled piping fixtures, appliances, or appurtenances in connection with sanitary drainage, storm drainage, venting or water supply system and are located in a nonexempt county subject to the provisions of the Plumbing Control Law, Ch. 553, F. S.?

2. Is an Escambia County manufacturer of prefabricated, modular, or other factory-built homes which contain preinstalled electrical wiring, devices, apparatus or equipment for light, heat, or power subject to the provisions of Chs. 57-1301 and 59-1264, Laws of Florida?

That which is common in both questions appears to be the vital feature of each. For example, both questions relate to Florida manufacturers of prefabricated modular or other factory-built homes which contain either pre-installed piping or electrical fixtures.

Chapter 553, F. S., titled "Florida Plumbing Control Act," regulates plumbing contractors engaged in or working at the business of plumbing in the state who have furnished the necessary bond to do plumbing in compliance with the minimum requirements of the state plumbing code and who obtain a state and county occupational license and any other license when required. See § 553.03, F. S.

Chapter 57-1301, Laws of Florida, regulates those engaged in installing, altering, or repairing, within the unincorporated areas of Escambia County, any electrical wiring devices or equipment within any building or enclosed structure.

Chapter 59-1264, Laws of Florida, refers to Ch. 57-1301, Laws of Florida, in the body thereof and provides, *inter alia*, for certificates of registration pursuant to Ch. 57-1301, with permits to be granted to master electricians intending to install electrical wiring, electrical apparatus or equipment for light, heat or power within, or attached to, any building or structure.

The words "building or structure" are also used in Ch. 57-1301, Laws of Florida. "Building," in Black's Law Dictionary, Revised 4th Ed., is defined as "that which is built." The term "subject to" as used in your dual question has been defined as "liable, subordinate, subservient, inferior, obedient to, governed or affected by," in the same volume.

Considering your questions in light of the above and also considering the well-settled rule of judicial construction that the words and terms of an act are to be given their most usual and obvious meaning, *City of Jacksonville v. Continental Can Co.*, 113 Fla. 168, 115 So. 488 (1933), it is only logical to assume the legislature did not have in mind applying the provisions of either Ch. 553, F. S., or Chs. 57-1301 or 59-1264, Laws of Florida, to a Florida manufacturer of prefabricated modular or other factory-built homes which contain piping fixtures or electrical fixtures which the manufacturer himself does not install,

maintain, alter or prefabricate; but rather the plain and natural significance of these laws relates to contractors engaging in the business of either plumbing or electrical contracting, within the confines of the definitions contained in the legislation under consideration. Your answer, therefore, to both questions is in the negative.

070-71—June 16, 1970

#### PERSONNEL

##### ANTINEPOTISM LAW—INAPPLICABILITY TO EMPLOYMENT OF NEPHEW-IN-LAW

To: L. D. Simmons, Clerk of Criminal and Civil Court of Record,  
Tampa

#### QUESTION:

Does the antinepotism statute, § 116.111, F. S., apply to and prohibit the employment of a nephew-in-law of the employing official?

Your question is answered in the negative.

Section 116.111, F. S., in terms, prohibits the employment of any individual who is a relative of the employing official; and the word "relative" is defined as "an individual who is related to the public official" in various named blood relationships—including "nephew"—and in several relationships by marriage. However, a "nephew-in-law" is not included among the named relationships by affinity.

It is well settled that an antinepotism statute, being penal in nature, must be strictly construed. See *State ex rel. Robinson v. Keefe*, Fla. 1933, 149 So. 638. Accord: AGO 070-15, of this publication. The son of a spouse's brother or sister is sometimes, by courtesy, referred to as the nephew of both spouses. But, insofar as *legal usage* is concerned, the word "nephew" is defined as "the son of a brother or sister." See Bouvier's and Black's law dictionaries. And cf. *Capps v. State*, Fla. 1924, 100 So. 172, in which the court upheld an indictment charging the accused with incest with his "niece" without describing the relationship as one of blood instead of affinity, the court stating that the words "uncle" and "niece" are generally understood to mean a blood relationship. The words "niece" and "nephew" have been held to include only blood relatives in other contexts, such as in a workmen's compensation statute, see *Fedi v. Ryan*, N.J. 1937, 193 A. 801; and in testamentary bequests, see *Schouler on Wills, Executors and Administrators* (Fifth Edition), § 536. See *Paige on Wills*, § 908, in which it is stated that the term "nephew and niece" does not include the wife of a nephew or the husband of a niece, nor does the term "nephews" ordinarily include nephews of the wife of the party designated. See also *Schoen v. Siegmund*, N.J.Ch. 1936, 183 A. 292, and authorities cited.

Moreover, as noted above, the statute expressly includes in the definition of "relative" certain in-law relationships, namely, father- and mother-in-law, son- and daughter-in-law, and brother- and sister-in-law. It is reasonable to assume, under the familiar rule of logic known as *expressio unius est exclusio alterius*, that if the legislature had intended to include any more distant "in-laws" within the statutory prohibition, it would have added them to the list.

In the light of the rule of strict construction here applicable, and in the absence of anything in the statute to indicate that any "in-laws" other than those expressly named therein were intended to be included within the statutory prohibition, I conclude that your question should be answered in the negative.

070-72—June 16, 1970

### TAXATION

#### TAX WARRANTS AND EXECUTIONS—AUTHORITY OF COUNTY SHERIFF OR HIS DEPUTY TO SERVE

To: *P. D. Reddish, Sheriff, Starke*

#### QUESTION:

Does the county sheriff or his deputy have the authority to serve tax warrants and executions pursuant to § 200.27 [§ 197.095], F. S.?

Section 200.27(3)[§ 197.095(3)], F. S., provides:

... [T]he tax collector in person or by deputy appointed by him for that purpose shall levy upon and seize tangible personal property of the delinquent taxpayer for unpaid taxes, and a written appointment from the tax collector with a statement from him of the person in whose name the property is assessed and the amount of taxes due shall be sufficient warrant and authority for the tax collector or said deputy to act, and it shall not be necessary for the tax collector or said deputy to take the tax roll or warrant annexed thereto with him. Deputy collector so appointed shall be liable to the same penalties prescribed by law as to tax collectors for neglect of duty or otherwise.

Opinions of my predecessors in office indicate that service of tax warrants and executions may be made by a sheriff or his deputy when designated by the tax collector under the statute for such duty. Upon consideration of subsequent changes in the law and cases I believe the earlier opinions may be regarded as current and correct. AGO's 049-348, Aug. 1, 1949, Biennial Report of the Attorney General, 1949-1950, p. 41, and 054-202, Aug. 17, 1954, Biennial Report of the Attorney General, 1953-1954, p. 41. Art. XVI, § 15, State Const., 1885; Art. II, § 5, State Const., 1968.

It is clear, however, that under the terms of the quoted statute those duties would be performed as deputy tax collector, and the acceptance of such appointment by a sheriff or his deputy does not appear to be required by the statute. Other provisions of law, such as § 200.30[§ 197.150], F. S., governing enforcement of a tax assessment outside the county, do specify service by the sheriff of the county to which property may have been removed. AGO's 061-203, Dec. 28, 1961, Biennial Report of the Attorney General, 1961-1962, p. 342, and 059-13, Jan. 22, 1959, Biennial Report of the Attorney General, 1959-1960, p. 31.

I conclude that you and your deputies may, upon request, serve tax warrants and proceed with execution as authorized by the statutes, serving in this connection as deputy tax collectors. The performance of such duties by your office is not, under the terms of § 200.27[§ 197.095], F. S., mandatory, but my opinion in this respect is of course subject to other specific statutory provisions which may be applicable to particular facts.



070-73—June 22, 1970

## TAXATION

NOTICE OF APPLICATION FOR TAX DEED, SUFFICIENCY—  
TENANCY BY THE ENTIRETY*To: J. T. Lawhorne, Clerk of the Circuit Court, Punta Gorda*

## QUESTION:

Is a notice of application for tax deed with respect to a tenancy by the entirety sufficient if only one notice, directed to both husband and wife, is sent to the family residence address?

This question was answered in the negative in *Alper v. LaFrancis*, Fla.App.1963, 155 So.2d 405. In that case the court gave a strict construction to the statute, § 194.18, F. S., 1961, requiring the notice to be mailed "to the owner of the property," and held that a separate notice must be mailed in a separate envelope to each of the spouses. See also *Montgomery v. Gipson*, Fla. 1954, 69 So.2d 305, holding that a special notice must be correctly addressed to each of the spouses to be sufficient under the statute.

The statute that was interpreted in those decisions, § 194.18[§ 197.505], F. S., is exactly as it was when they were rendered, except that it has been renumbered and now appears as § 197.505, F. S., 1969. This being so, the cited decisions remain the controlling law and require that your question be answered in the negative.

070-74—June 23, 1970

## PUBLIC OFFICERS

RESTRICTIONS ON QUALIFYING FOR OFFICE—  
RESIGNATION DEADLINE—§ 99.012, F. S.*To: Tom Adams, Secretary of State, Tallahassee*

## QUESTION:

Does "the first day of qualifying" referred to in § 99.012(2), F. S., refer to the first day of the qualifying period provided for in § 99.061, F. S., as amended by Ch. 70-93, Laws of Florida, or to the day on which the candidate actually qualifies?

Section 1, Ch. 70-80, Laws of Florida(§ 99.012(2), F. S.), requires the resignation of an individual who qualifies as a candidate for public office and who holds another office "not less than ten days prior to the first day of qualifying for the office he intends to seek." The act states that "no individual may qualify" if he does not resign by the deadline provided in the act. It seems clear from the above-quoted language that the deadline is 10 days prior to the first day of the statutory qualifying period for the office he seeks. The alternative construction suggested by your letter would only be possible if you assume the candidate will qualify on several days and the deadline is set on his first day of qualifying.

You are correct in assuming that a person presently holding office would be precluded from qualifying even during the statutory qualifying period if he had not resigned from his present office when required by the act. However, this would apply only where the terms of the two offices, wholly or partly, run concurrently.

In summary, the answer to your question is that the phrase "the first day of qualifying" appearing in §99.012(2), F. S., refers to the first day of the statutory qualifying period for the office sought.

This ruling does not, of course, deal with the question of the act's constitutional validity, an issue which is presently before the Florida Supreme Court for decision. It is possible the Court's decision will render the above inquiry moot.

070-75—June 26, 1970

#### JUVENILES

##### FINGERPRINTS—CONFIDENTIALITY—DISPOSITION BY LAW ENFORCEMENT AGENCY

To: Marvin U. Mounts, Jr., County Solicitor, West Palm Beach

#### QUESTION:

May a sheriff's office that has taken the fingerprints of a child in custody upon probable cause of having committed an act which would be a felony if he were an adult code and commingle the child's fingerprints with those of adults?

Section 39.03(6)(a) and (b), F. S., pertaining to fingerprints or photographs made of a child while in custody upon probable cause of having committed an act which would be a felony if he were an adult, specifically provides that the:

(a) . . . fingerprints and photographs so taken shall be kept by the agency making such fingerprints and photographs in a separate file maintained by said agency for that specific purpose . . . .

and that:

(b) All fingerprints and photographs taken pursuant to this subsection, including all duplicate copies thereof furnished pursuant to this subsection, shall be marked "Juvenile Confidential" and kept in a separate file by each law enforcement agency having possession thereof, and shall not be considered public records. . . .

The intermingling or commingling of a child's fingerprints taken pursuant to §39.03(6), F. S., with those of an adult would not be in compliance with the mandate of the legislature that the fingerprints of the child shall be marked "Juvenile Confidential" and kept in a separate file by each law enforcement agency having possession thereof. Your question is answered in the negative.

070-76—June 30, 1970

#### PERSONNEL

##### ANTINEPOTISM LAW—SALARY RAISE TO RELATIVE OF PUBLIC OFFICIAL

To: Roland X. Droit, Supervisor of Elections, Sebring

#### QUESTION:

May a public official include a relative in a routine annual salary raise given to each employee under his supervision?

Your question is answered in the affirmative. It appears that the prohibited relationship arose subsequent to the effective date of § 116.111, F. S. (Ch. 69-341, Laws of Florida). Thus, as noted in AGO 070-18, of this publication, the applicable provisions of the antinepotism statute are those providing that the public official may not "promote, or advance, or advocate for... promotion, or advancement... a relative...."

To "promote" is to exalt in station, rank, or honor, according to *McArdle v. City of Chicago*, 172 Ill. App. 142. Webster's Seventh New Collegiate Dictionary lists "advance" as a synonym of "promote." Most of the decisions are in agreement that a mere increase in the salary of an employee that is not beyond the limit fixed for the grade in which such a position is classified does not constitute a "promotion." See *Petition for Prendergast*, 80 N.Y.S. 2d 739, 744; and *Mandle v. Brown*, 152 N.E.2d 511, 515.

In AGO 070-15, of this publication, it was noted that the Fla. Sup. Ct. has ruled that an antinepotism statute, having a high penalty, must be strictly construed, citing *Robinson v. Keefe*, Fla., 1933, 149 So. 638. When construed in the light of its purpose to discourage "the bestowal of patronage by public officers in appointing others to offices or positions by reason of their blood or marital relationship to the appointing authority, rather than because of the merit or ability of the appointee," *Robinson v. Keefe*, *supra*, it seems clear that a routine salary increase given across the board to all employees could include a relative without doing violence to either the letter or the spirit of the antinepotism statute.

070-77—July 2, 1970

#### HUSBAND AND WIFE

#### DOMESTIC RELATIONS—SUPPORT OF WIFE—CRIMINAL PROSECUTION FOR VIOLATION OF § 856.04, F. S.

To: *James W. Geiger, County Solicitor, Fort Lauderdale*

#### QUESTIONS:

1. If a wife has sued for divorce or separate maintenance and is able to support herself as a school teacher, is a husband subject to criminal prosecution for refusal or failure to comply with a circuit court judge's order for temporary or permanent support?

2. If there are no divorce proceedings pending, or suit for separate maintenance, does it constitute a violation of the statute for nonsupport for a husband to withhold support if the wife is able to support herself or is supporting herself or, in the case of children, if the wife is able to support, or is in fact supporting, the children?

To begin with, it is pertinent to point out that a man is not subject to a criminal prosecution for failing or refusing to comply with a circuit court order that he make payments for the support of his wife or children. Any prosecution for withholding support must be for a violation of § 856.04, F. S., which makes it a crime for a man willfully to withhold the means of support from his wife or children. Incidentally, a support order could require a man to make payments large enough to provide luxuries for his dependents, whereas § 856.04 authorizes the prosecution of a man only for willfully withholding the necessities of life. I quote from our Supreme Court's opinion in *Raborn*

v. State, 72 So. 463, 464: "... this law does not require *luxuries* to be supplied by the parent, but the means of support that he must withhold to make him amenable to the act contemplates only the *necessities of life* such as he has the ability to supply." (Emphasis supplied.)

It is also pertinent to observe that a man is not subject to prosecution under this statute for willfully withholding the means of support from his ex-wife from whom he has been divorced. This is so because the statute applies to the *wife* (and children), and a woman who has been divorced from her husband is not his wife. The views expressed in this paragraph are in line with AGO 050-311, June 23, 1950, Biennial Report of the Attorney General, 1949-1950, p. 584, which was rendered by one of my predecessors in office.

Next I will discuss Florida Supreme Court decisions concerning criminal responsibility under § 856.04, F. S. In *Stedman v. State*, 86 So. 428, 430-431, the court said:

... "*Withholding*" the means of support means something more than failure to support or "nonsupport." It presupposes the existence of or the ability to obtain the "means of support" by the accused, and need by the alleged dependent or dependents from whom support is withheld. That which has no existence, actual or potential, cannot be withheld; neither can that be withheld which is already possessed. The object generally of such statutes is to prevent the alleged dependents from becoming public charges. ..." (Emphasis supplied.)

In *Busch v. State*, 120 So. 762, 763, one of the reasons given by the Florida Supreme Court for reversing the conviction of a husband for withholding the means of support from his wife was "... because of the lack of evidence to prove the need of the alleged dependent ..." (Emphasis supplied.)

While *Fekany v. State*, 163 So. 221, involved the alleged withholding of the means of support by a father from his children, the legal principle therein established by our Supreme Court is equally applicable to the withholding of the means of support by a husband from his wife. There the court said:

The court, in his charge to the jury, gave the following instruction:

It is no defense to a father charged with deserting and withholding the means of support from his children that the children are being supplied with the means of support by the mother out of her own means or by her own exertions or labors, or by the children's own labors, but if the mother has money or property supplied by the father with which to supply the children with the means of support, then he would not be guilty. (Emphasis supplied.)

Exception was duly noted to this instruction.

The instruction is in conflict with the law as enunciated by this court in the case of *Stedman v. State*, 80 Fla. 547, 86 So. 428, 430, in which it was said: (Emphasis supplied.)

At common law abandonment by or neglect of a husband to support his wife was not a criminal offense. 21 Cyc. 1611. The statutes therefore making such acts indictable and punishable as a crime must be strictly construed. "*Withholding*" the means of support means something more than failure to support or "nonsupport". It presupposes the existence of or the ability to obtain the "means of support" by the accused, and need by the alleged dependent or dependents from whom



*support is withheld. That which has no existence, actual or potential, cannot be withheld; neither can that be withheld which is already possessed.* (Emphasis supplied.)

The giving of this charge was error, for which the judgment should be reversed.

I understand the Florida Supreme Court's pronouncements in the Fekany case to mean that a father cannot be convicted of withholding support from his children if they are not in need because they are being supported by their own labors or by the labors of their mother or by the mother out of her own means or estate. By the same token, a husband may not be convicted for withholding the means of support from his wife if she is supporting herself out of her own means or by working as a school teacher or at other employment.

The Florida Supreme Court's decision in *Floyd v. State*, 155 So. 794, was in line with its above-quoted pronouncements in the *Stedman* case to the effect that that which is already possessed cannot be withheld and that the object of such statutes is to prevent dependents from becoming public charges. In the *Floyd* case a father was convicted for withholding the means of support from his child. In reversing the conviction, the court said: "The record shows that *the child is being supported by its mother's parents. Under the rule stated in Stedman v. State*, 80 Fla. 547, 86 So. 428, 430, *the evidence in this case is not sufficient to warrant the conviction.* . . ." (Emphasis supplied.)

The Florida Supreme Court's decision in *Chavers v. State*, 193 So. 537, was also in line with the principles enunciated in the *Stedman* case. In reversing *Chavers'* conviction for withholding the means of support from his child, the court said:

On the trial the State failed to meet the rule enunciated in the case of *Stedman v. State*, 80 Fla. 547, 86 So. 428 and in *Fekany v. State*, 121 Fla. 51, 163 So. 221.

The record shows that *the child was an infant, about three weeks old, living with its mother and her parents, and the record fails to show that the child does not have what its necessities require.*

*This statute or proceeding thereunder may not be used as a substitute for civil proceedings to compel husband to contribute a reasonable part of his earnings toward the support of his family.* . . . (Emphasis supplied.)

In the light of the above-mentioned decisions of the Supreme Court of Florida, it is my opinion that:

1. If a wife is actually supporting herself by teaching school or performing other work, her husband is not subject to prosecution for withholding from her that which she already has, viz., the means of support.

2. If a husband is able to support his wife, he could not defend against a prosecution under § 856.04, F. S., on the theory that she could have obtained employment and supported herself if she had chosen to do so. A man who should be supporting his wife cannot relieve himself of the burden of doing so by insisting that she obtain employment and support herself.

3. If the wife has the financial resources with which she could support herself, the husband is not subject to prosecution for withholding from her that which she already has, viz., the means of support.

4. If the wife-mother is actually supporting the children by her labors or out of her own financial resources, the husband-father is not subject to prosecution for withholding from the children that which is already being furnished by the wife-mother, viz., the means of support.

5. If the wife is able to support the children from her own financial resources or by working, but does not do so, the father is criminally responsible if he willfully withholds from the children the means of support.

\*This opinion has only to do with criminal violations of § 856.04, F. S. It does not say, or even intimate, that a man who willfully fails to comply with a support order is immune from punishment for contempt of court. As appears from 10 Fla.Jur. 633-634, Divorce, etc., § 227:

The remedy of contempt is available whenever there has been a wilful [sic] violation of any order or decree of a court of equity. And in this State actions for divorce and for alimony without a divorce are brought in equity. Accordingly the remedy of contempt is available to enforce a decree or order for temporary alimony, permanent alimony or separate maintenance, an order for the support of a minor child, and a provision for suit money and attorneys' fees. In fact it is said that the usual remedy where the husband refuses or fails to comply with the monetary provisions of a decree in an action for a divorce or separate maintenance is a contempt proceeding.

070-78—July 2, 1970

# COURTS

## COUNTY JUDGES' COURT—FEES—§ § 36.17, 36.20, F. S.—CH. 70-134, LAWS OF FLORIDA

To: James W. West, County Judge, Bushnell

### QUESTION:

What is the effect of Ch. 70-134, Laws of Florida, on the fees of the county judges prescribed by § § 36.17 and 36.20, F. S.?

Chapter 70-134, Laws of Florida, appears to have been intended as a codification of the various statutes specifying the filing or other fees to be paid to the clerks of the circuit courts for the services performed by the clerks under such statutes. It revises the fee schedule for the clerks, now referred to as "service charges," contained in § 28.24, F. S., and amends many other statutes by adding to or changing the existing service charges provided for therein. It adds new section 28.231, F. S., to provide that "the clerk of any state appellate or county or state trial court shall receive as compensation for similar services the same charges as provided in this chapter for the clerk of the circuit court."

Chapter 70-134, Laws of Florida, does not mention § 36.17, F. S., which sets up a fee schedule "to be charged by the county judges" and provides that "when not otherwise specified, the county judge's fees shall be the same as charges made for like services by the clerk of the circuit court." (Emphasis supplied.) Nor does it refer to § 36.04, F. S., authorizing the county judges to appoint their clerks and to provide for their compensation, nor to § 44.07, F. S., declaring that "the independence of the county judges shall be preserved concerning . . . selection of personnel, and the hiring, firing, and setting of salaries of such personnel . . ." (Emphasis supplied.)

\*The remaining portion of this opinion was substantially contained in supplemental opinion 070-77A July 22, 1970, the remaining portions of which have been omitted from this publication.

Applying the rule of logic, *inclusio unius est exclusio alterius*, it is reasonable to assume that if the legislature had intended to change the legislative pattern provided by Chs. 36 and 44, F. S., for the reimbursement of county judges and their clerks, it would have been a simple matter to have included such statutes—and the changes intended to be effected therein—in the comprehensive act here in question, Ch. 70-134, Laws of Florida. In the absence thereof, it must be concluded that the schedule of fees specifically provided by § 36.17, F. S., for county judges' courts, and the method of compensation of the clerks of such courts as provided by § 36.04, F. S., have not been changed.

The schedule of fees under Ch. 70-134, Laws of Florida, for services of the circuit court clerk in connection with criminal proceedings will, of course, be applicable to the fees of the county judge for such services, as provided by § 36.20, F. S., as well as to fees for services that are not scheduled under § 36.17(3), F. S.

070-79—July 7, 1970

#### REGULATION OF VOCATIONS

##### BARBERS SANITARY COMMISSION, FUNDS—AUTHORITY OF DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

To: Rodger A. McDougall, Director, Barbers Sanitary Commission,  
Tallahassee

#### QUESTION:

1. Does the secretary of the department of professional and occupational regulation have the power to authorize the transfer of funds from the barbers sanitary commission to the department of professional and occupational regulation without the approval of the barbers sanitary commission?

2. Is the barbers sanitary commission required to submit vouchers authorizing the disbursement of funds to the department before such vouchers are submitted to the comptroller's office?

The barbers sanitary commission is assigned to the department of professional and occupational regulation under a type 2 transfer pursuant to the governmental reorganization act (Ch. 20, F. S.).

Section 476.19, F. S., provides that funds collected by the barbers sanitary commission "shall be expended in accordance with law for all necessary and proper expenses in carrying out the provisions of this chapter upon proper claim approved by said commission, or a finance committee thereof." (Emphasis supplied.)

Section 215.37, F. S., lists all licensing and examining boards, including the barbers sanitary commission, and provides the manner in which funds for licensing and examining boards are to be collected, deposited in the state treasury and disbursed. Section 215.37(6), F. S., states in part that "all disbursements shall be made by the comptroller only as provided by law for all agencies of government."

In enacting this statutory provision (§ 215.37(7), F. S.), the legislature declared that:

*It is the intent and purpose of the legislature to place all examining and licensing boards under strict budgetary control and to determine the policy of budgeting all collections and expenditures of moneys collected through examining and licensing laws and to be used by the boards for enforcement and administrative purposes. (Emphasis supplied.)*

In ascertaining the law with regard to the disbursement of funds by a licensing or examining board, § 20.06(2), F. S., providing for a type 2 transfer, mandates that "each examining and licensing board . . . shall continue to have supervision and control of such funds collected in trust in connection with its licensing, certifying, and related activities as shall be appropriated to it. . . ." (Emphasis supplied.)

From an analysis of the language noted above, it is clear that the legislature intended the barbers sanitary commission—and other licensing and examining agencies—to have "supervision and control" of such funds collected in trust in connection with its activities as shall have been appropriated to it, thereby vesting such agency with "the right and duty to spend its funds which have been retained by the agency pursuant to its budget . . . ." (See AGO 070-5, Feb. 2, 1970, of this publication.)

Section 20.30, F. S., creates the department of professional and occupational regulation and delineates the services which may be rendered by the department to the several licensing and examining agencies assigned thereto. Section 20.30(9), F. S., provides that:

The costs of any of the services provided for the examining and licensing boards shall be prorated among the boards according to the amount of services provided by the department . . . . (Emphasis supplied.)

Of course, such licensing and examining agencies may provide for their own services pursuant to a type 2 transfer, except for such ministerial services as delineated in § 20.30(5), F. S., rather than secure such delineated services from the department of professional and occupational regulation.

Since the barbers sanitary commission is independently responsible for its budget, no department or agency may authorize the removal of funds from the commission's budget without approval by the commission. Accordingly, question 1 is answered in the negative.

Explicit in the statutory language noted above is the legislative intent to allow licensing and examining agencies unfettered control and supervision over their respective budgets. Therefore, any encumbrance or burden placed upon such agencies in their budgetary operations does violence to this legislative intent.

By your second question, I am assuming that the purpose of such requirement is to permit the department of professional and occupational regulation to control and supervise to some degree the financial operation of the barbers sanitary commission.

Such purpose clearly is contrary to the legislature's cloak of independence placed around agencies assigned under a type 2 transfer. Accordingly, question 2 is answered in the negative.

070-80—July 7, 1970

#### COURTS

#### STATE ATTORNEY—DEFENSE OF MALICIOUS PROSECUTION—USE OF PUBLIC FUNDS

To: Richard E. Gerstein, State Attorney, Miami

#### QUESTION:

May state budgeted funds or county budgeted funds be used to pay private attorneys to defend malicious prosecution suits brought against the state attorney of the 11th Judicial Circuit and some of his assistants on account of criminal cases instituted and prosecuted by them in the criminal court of record of Dade County?



A prosecuting attorney is not liable for damages on account of acts done in performing his duties. I quote from 27 C.J.S. 680-681, *District and Prosecuting Attorneys*, § 16:

Being, as discussed supra § 1a, a judicial or quasi-judicial officer, a district or prosecuting attorney enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation, and is not liable for damages for acts done in the course of his duty, although willful, malicious, or libelous, but is immune from ordinary civil responsibility for what he says and does in discharge of the duties of his office, especially where there is no showing that he acted maliciously or corruptly or that he disregarded any law....

To the same effect is the following quotation from 42 Am.Jur. 256-257, *Prosecuting Attorneys*, § 21:

...It is undoubtedly the majority rule that a public prosecutor cannot be compelled to answer to a private citizen for the performance of duties which rest upon him as a public official, since, as has been seen, prosecuting attorneys are quasi-judicial officers. Thus, where a state's attorney passes upon the sufficiency of evidence before a justice of the peace or the sufficiency of evidence within his own knowledge, as a basis for a criminal prosecution, he acts in a judicial capacity and is not liable in a civil action for a judicial mistake, or for having process issued to make his decision effective....

As was aptly said by the Sup. Ct. of Washington in *Anderson v. Manly*, 43 P.2d 39:

...The doctrine of exemption of judicial and quasi-judicial officers (the prosecuting attorney comes within the second classification) is founded upon a sound public policy, not for the protection of the officers, but for the protection of the public, and to insure active and independent action of the officers charged with the prosecution of crime, for the protection of life and property.

\* \* \* \* \*

...The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

If prosecuting attorneys are to perform the duties which the public has the right to expect them to perform, they must be independent and free to exercise their judgment as to whether particular criminal cases should be instituted and prosecuted. They should be able to act in the performance of their duties without danger of having to expend their own moneys to employ lawyers to defend them against malicious prosecution suits brought by persons they have prosecuted. The public is the ultimate beneficiary when a prosecuting attorney's independence is promoted by eliminating such a risk, and I think that, if available,

public funds should be used to pay attorneys' fees for the defense of such malicious prosecution suits.

A state attorney is a state officer, *Hall v. State*, 187 So. 392, and is required to have a state budget, § 27.33, F. S. Therefore, if your state budget provides funds which it does not allocate for other specific purposes, I think that it is proper to expend the same to pay the attorneys' fees here under discussion. However, if all of the moneys provided for in your state budget are allocated to other specific purposes, there does not appear to be any way to expend any of those funds to pay such attorneys' fees unless your budget is revised in accordance with Ch. 216, F. S., and Ch. 69-106, Laws of Florida, so as to make budgeted funds available to pay such attorneys' fees. Section 27 of the 1970 General Appropriations Act, Ch. 70-95, Laws of Florida, forbids the payment of attorneys' fees from moneys appropriated in the "Deficiency" and "Emergency" items, and therefore none of the moneys appropriated under those items can be released for expenditure by you in payment of attorneys' fees for defending said malicious prosecution suits.

Also, I think that it is proper for the board of county commissioners of Dade County to pay such attorneys' fees if county funds are available for that purpose. This is so because you and your assistants also serve a county purpose when you prosecute in the criminal court of record, in which court the prosecutions were conducted out of which the malicious prosecution suits arose.

When you prosecute in the criminal court of record, you perform the duties which are normally performed by a county solicitor (who is a county officer rather than a state officer, *Pelavez v. State*, 144 So. 364). The only reason that you prosecute in said court is that Art. V, § 9B, State Const., abolished the office of county solicitor of Dade County in January, 1957, and provided for the performance of his duties by the state attorney. The said board of county commissioners has properly recognized that you are serving a county purpose when you prosecute in the criminal court of record by budgeting funds to assist you in so doing.

Since you and your assistants were serving a county purpose when you instituted and maintained the prosecutions on account of which the malicious prosecution suits were filed, if county funds are available for that purpose, they may also be used to pay attorneys' fees for the defense of said suits.

070-81-July 13, 1970

#### TAXATION

#### HOMESTEAD EXEMPTION ON LEASEHOLD LIFE ESTATE

To: *Mac S. Haines, Tax Assessor, Clearwater*

#### QUESTION:

Does a lease of real property for a tenant's own life or for the life of another or in the alternative for a term of 99 years, whichever is longer, constitute an interest in real property and qualify for homestead exemption if the lessee otherwise qualifies?

An affirmative answer is required by several earlier opinions of my predecessors in office, and authorities therein discussed, concluding that "leasehold estates for life have usually been considered as freeholds or

*real property*" for homestead purposes under Art. X, § 7, State Const., 1885, containing the exemption now stated in Art. VII, § 6, State Const., 1968, for "every person who has the legal or equitable title to real estate . . ." Attorney General Opinion 053-45, Feb. 23, 1953, Biennial Report of the Attorney General, 1953-1954, p. 314; AGO 052-298, Oct. 29, 1952, Biennial Report of the Attorney General, 1951-1952, p. 360; AGO 062-145, Nov. 5, 1962, Biennial Report of the Attorney General, 1961-1962, p. 606.

Although it has been recognized that estates for a term of years, however long, should be regarded as personal property in the absence of some basis for departure from common law principles, *De Vore v. Lee*, 158 Fla. 608, 30 So.2d 924, the terms of the lease described above would apparently create a leasehold for the life of an individual, with a contingent remainder for an aggregate term of 99 years if the life estate leasehold ends prior to such period. The lease in question states a minimum term for the life of the tenant or another person, which could not be limited in duration by the possible alternative term of years. There appears to be no problem of merger of such estates however improbable it is that the life tenancy would be the longer term. *McCreary v. Coggeshall*, 74 S.C. 42, 53 S.E. 978. Am.Jur. 2nd, *Estates*, § 59 *et seq.*

My conclusion does not, of course, extend to the situation which may be presented upon termination of the life estate in question.

070-82—July 22, 1970

#### OCCUPATIONAL LICENSES

##### CONSTRUCTION CONTRACTOR—EVIDENCE OF REGISTRATION WITH CONSTRUCTION INDUSTRY LICENSING BOARD PREREQUISITE TO OBTAINING LICENSE

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

#### QUESTION:

Is an applicant for an occupational license who has successfully met the requirements of a local examining board required to show evidence of registration with the Florida construction industry licensing board as a prerequisite to the issuance to him of an occupational license when he applies for said license in the county in which he met the requirements of the local examining board?

Evidence of registration with the Florida construction industry licensing board is a prerequisite for issuance of an occupational license to a contractor. Part II, Ch. 468, F. S., provides alternate methods by which a contractor may practice his trade in the state. Section 468.105(2)(a) and (3), F. S., provides:

(2) Persons not engaged in contracting on the effective date of this part, but later desiring to enter the business shall register with or obtain a certificate from the board under one of the following provisions:

(a) If the area in which the applicant desires to enter the business of contracting has a local board which requires a local competency examination, the applicant shall comply with the local examining and licensing requirements in the area and then file with the board evidence of successful compliance with the local examination and licensing requirements on a form pre-

scribed by the board, accompanied by the registration fee fixed by this part. No examination shall be required by the board for registration under this subsection.

\* \* \* \* \*

(3) Registration permits the registrant to engage in contracting only in the area and for the type of work covered by the registration, unless the state and local licenses are issued for other areas and types of work or unless certification is obtained.

Local registration is the situation envisioned by your letter and should be distinguished from "certification" under § 468.106, F. S. If a person is "certified" under the aforementioned section, he is qualified to practice in *any* county in the state. As has been shown, when a person has met local requirements, he may practice *only* in that area and is required to register with the Florida construction industry licensing board in accordance with § 468.105, F. S.

Section 205.301, F. S., governs occupational licenses for contractors. Nothing in that section requires proof of registration or certification before obtaining such a license. However, § 205.461(2), F. S., states:

Every person engaged in a profession, business or occupation regulated by law where licensing and qualification standards are required shall display and exhibit to the tax collector the license for the current year prior to the tax collector issuing an occupational license pursuant to this chapter.

Since § 468.105, F. S., clearly requires registration with the Florida construction industry licensing board, it is my opinion that it is necessary to show evidence of registration before the issuance of an occupational license.

070-83—July 22, 1970

#### TAXATION

##### TAX EXEMPTION APPLICATIONS—REVIEW BY BOARD OF TAX ADJUSTMENT

To: *Ralph B. Wilson, County Attorney, Fort Pierce*

##### QUESTION:

Are original applications for tax exemptions other than homestead exemptions to be considered and granted by the board of tax adjustment rather than the tax assessor, or are only applications for tax exemptions which have been denied by the tax assessor to be considered by the board of tax adjustment?

Applications for tax exemptions, including original as well as renewal applications, are now subject to review by the board of tax adjustment only upon dispute or appeal of the assessor's action on such applications.

Section 26, Ch. 70-243, Laws of Florida, which section became effective July 1, 1970, amends § 194.015, F. S., to read, in part, as follows:

(2) The board of tax adjustment shall adjust the tax rolls, hear complaints against individual assessments, hear complaints



against denials of homestead exemption by the tax assessor, and hear *disputed or appealed* applications for exemptions from ad valorem taxation. (Emphasis supplied.)

Section 27 of Ch. 70-243, Laws of Florida, amends § 194.032, F. S., to read:

(1) The board of tax adjustment shall meet on or before the first Tuesday in September for the purpose of considering petitions relating to assessments, hearing complaints relating to homestead exemptions, as provided for under § 196.151, and *hearing disputes and appeals on applications for ad valorem tax exemptions* filed pursuant to § 196.011. . . . (Emphasis supplied.)

These provisions clearly express an intent that applications for exemption are to be reviewed by the board of tax adjustment for 1970 and subsequent years only when such review is initiated or invoked by dispute or appeal. That conclusion is also indicated by a consideration of the 1970 amendments in conjunction with former statutory provisions on this point. Sections 194.015 and 194.032, F. S., incorporating changes effected by Ch. 69-140, Laws of Florida, in former § 193.25-193.27, F. S.

070-84—July 22, 1970

#### TAXATION

#### MODULAR HOMES—ASSESSMENT AS PERSONAL OR REAL PROPERTY—HOMESTEAD EXEMPTION

To: Mac S. Haines, Tax Assessor, Clearwater

#### QUESTIONS:

1. Should a modular home be assessed for tax purposes as tangible personal property or real property or is it a motor vehicle for which a license tag is required?

2. If the modular home is considered real property, is the owner of the modular home itself, who is leasing the land, entitled to homestead tax exemption on the modular home?

The questions refer to factory-assembled modular homes which are transported on flatbed trucks and placed on foundations on homesites by purchasers who obtain title to the home and lease the land for a period of one to five years.

#### AS TO QUESTION 1:

The unit described appears to be subject to property taxes and not to license tax as a motor vehicle, under Ch. 70-391, Laws of Florida, enacted by the 1970 legislature, which became a law on July 7, 1970, effective that date, amending § 320.015, F. S., which states:

... A prefabricated or modular housing unit or portion thereof not manufactured upon an integral chassis or undercarriage for travel over the highways shall not be licensed as a motor vehicle even though transported over the highways to a site for erection or use.

Other amendments effected by this law define vehicles subject to license tax as those "equipped... for operation over the streets," including units "manufactured upon a chassis or undercarriage as an integral part thereof..." Section 1, Ch. 70-391, Laws of Florida, amending § 320.01(1)(b), F. S.

Although § 320.015, F. S., as amended, provides that the defined vehicles "shall be subject to a license tax... unless the vehicle is permanently affixed to the land and taxed as real property," this statute covers only those units within the definition stated in amended § 320.01(1)(b), F. S. Assuming that the modular homes in question are not "manufactured upon a chassis or undercarriage as an integral part thereof," they would not appear to be subject to license tax and would remain subject to ad valorem property taxes. The question of whether any particular structure, not within the statutory definition in § 320.01, F. S., should be taxed as personal property or as a part of real property to which it has become affixed is one for determination by the assessor on the basis of existing facts and intent.

#### AS TO QUESTION 2:

Under the circumstances described, this question is answered in the negative, because one who holds a leasehold interest for a term of years in land upon which is located a modular home owned by such lessee would not have "the legal or equitable title to real estate" under Florida law requiring such for homestead exemption. Article VII, § 6, State Const., 1968. Although the Florida Supreme Court has recognized that the legislature may define real property to include a 99-year condominium leasehold for homestead tax exemption purposes, *Ammerman v. Markham*, Fla. 1969, 222 So.2d 433, in the absence of such an express legislative definition, or some judicial declaration with respect to the current constitutional language, I believe the earlier opinions of this office remain correct in concluding that a leasehold for a term of years does not constitute real property. Attorney General's Opinions 053-335, and 053-45, Dec. 22, 1953, and Feb. 23, 1953, Biennial Report of the Attorney General, 1953-1954, pp. 312 and 314, 060-56, Mar. 21, 1960, Biennial Report of the Attorney General, 1959-1960, p. 525.

The leasehold status of land upon which such property is located would be material but not conclusive in determining whether a modular home should be assessed as personal property or as a part of the real property upon which it is located, under the authorities governing the fixture rule referred to in AGO 069-33, of this publication. Your question, however, is directed to a lessee's right to homestead exemption, which would have to be based on some legal or equitable title to real estate other than the leasehold described, even assuming ownership and residence in the home in question.

070-85—July 22, 1970

#### BOARD OF TAX ADJUSTMENT

##### MEMBERSHIP—ROTATION OF SCHOOL BOARD MEMBERSHIP

To: *Emmet B. Anderson, Attorney, Lee County School Board, Fort Myers*

#### QUESTION:

Must the two school board members who are required to act on the county board of tax adjustment be the same two members throughout the entire proceedings or can these members be rotated by appointment of the chairman of the district school board?

Section 26, Ch. 70-243, Laws of Florida, effective July 1, 1970, amends § 194.015(1), F. S., to read as follows:

(1) There is hereby created a board of tax adjustment for each county, which shall consist of three members of the governing body of the county as designated by the chairman of the board of said governing body, one of whom shall be designated as chairman, and two members of the school board as designated by the chairman of the school board. Any three members shall constitute a quorum of the board. *Members of the board of tax adjustment may be replaced from time to time by other members of their respective boards on appointment by their respective chairman. . . .* (Emphasis supplied.)

The emphasized language clearly provides that replacement, or rotation, shall be permissible in the course of the board's proceedings by appointment of the chairman of the district school board of replacement members from that board. The statute's provision for replacement "from time to time" does not in my opinion either limit or compel the duration of service by particular members.

070-86—July 27, 1970

#### SUWANNEE COUNTY

#### COUNTY HOSPITAL CORPORATION—RACE TRACK FUNDS, TAX MILLAGE

To: *Suwannee County Hospital Board, Live Oak*

#### QUESTION:

1. What amount of race track funds distributed under § 550.13, F. S., is the Suwannee County hospital corporation entitled to receive?

2. What is the limitation on increasing the ad valorem tax millage authorized by §§ 4 and 5, Ch. 23547, Laws of Florida, 1945?

Question 1 is answered by § 1, Ch. 30250, Laws of Florida, 1955, which provides in part:

All funds received by the Board of County Commissioners of Suwannee County, Florida, from the Race Track Funds under Section 550.13, Florida Statutes, 1941, and acts amendatory and supplementary thereto, shall be distributed in the following manner:

(A) The First Ten Thousand Dollars (\$10,000.00) received annually shall be paid to the Suwannee County Hospital Corporation.

In response to question 2 above, former §§ 193.031 and 193.03, F. S., dealing with limitations on percentage of annual increase of millage, were repealed by Ch. 69-286, Laws of Florida. In the absence of any limitation by special act, § 4(b), Ch. 23547, Laws of Florida, 1945, therefore permits an increase to the maximum annual levy of five mills subject to apportionment as provided in § 200.071(2) (formerly § 193.321(2)), F. S., stating:

The board of county commissioners in counties not having a budget commission or board shall have authority, in event the aggregate of the proposed millage for said county and districts therein aggregate more than the maximum allowed hereunder, to apportion the millage to be levied for county officers, departments, divisions, districts, commissions, authorities and independent taxing agencies so as not to exceed the maximum millage provided herein under this section or § 200.091. . . .

070-87-July 27, 1970

DADE COUNTY

PETITIONS FOR REVIEW OF ASSESSMENTS BY  
COUNTY BOARD OF TAX ADJUSTMENT—  
EXTENSION OF DEADLINE FOR FILING

To: *Stuart Simon, Assistant County Attorney, Miami*

QUESTION:

May the board of county commissioners lawfully extend the July 15 deadline for the filing of petitions seeking review of assessments under § 194.011(3), F. S., 1969, as amended by Ch. 70-243, Laws of Florida?

Said § 194.011(3), F. S., provides in part as follows:

(b) The completed petition shall be filed with the clerk of the governing body of the county who shall acknowledge receipt thereof and shall promptly furnish a copy thereof to the assessor.

(c) Each petition shall state the approximate time anticipated by the taxpayer to present and argue his petition before the board.

(d) Such petition may be filed at any time during the taxable year prior to July 15, or, if the period in which the tax roll must be prepared is lawfully extended, then within fifteen days of the completion of the roll and its presentation to the board of tax adjustment.

Section 9, Ch. 70-243, Laws of Florida (§ 193.023, F. S.) effective 1971, vests in the department of revenue the authority to extend the period for completing the tax roll.

According to facts stated in your letter, the tax assessor has properly and timely complied with (1) and (2) of § 194.011, F. S., requiring completion of the tax roll and notice of increased assessments on or before July 1. In that situation, the statute makes no provision for extension of time for filing petitions for review of assessments, and your question is answered in the negative.

The acceptance and transmission of such petitions by the clerk of the governing body of the county under § 194.011(3)(b), F. S., constitutes an act merely ministerial in nature which should be performed upon presentation of a petition in proper form. The effect of such a petition filed after the date specified by the statute appears to be governed by the decisions in *Jasper v. St. Petersburg Episcopal Community, Inc.*, Fla. App. 1969, 222 So.2d 479, and *Gamma Phi Chapter v. Dade County*, Fla. 1967, 199 So.2d 717, holding the doctrine of laches should control the application of such statutory prescriptions designed for orderly processing of tax assessments. The opinions in those cases indicate the circumstances on which the exercise of administrative discretion in this connection should be based.

My conclusions, in sum, are that the statutes do not provide for extension by the board of county commissioners of the time for filing petitions for review of assessments after timely completion of the tax roll and that failure to meet the statutory deadline is not an absolute bar to such petitions, which may be considered by the board of tax adjustment when it determines that the delay was not in fact prejudicial to the performance of its functions in the taxing process.



070-88—July 27, 1970

## CLERKS OF CIRCUIT COURT

FEE FOR MORTGAGE FORECLOSURE SALE OF PROPERTY—  
§ § 45.031 AND 702.02, F. S.; CH. 70-134,  
LAWS OF FLORIDA

To: Arthur H. Beckwith, Jr., Clerk, Circuit Court, Sanford

## QUESTION:

In making a sale of property pursuant to a mortgage foreclosure decree, is the clerk entitled to the fee prescribed by § 702.02(2)(d), F. S., 1969, or that prescribed by § 45.031, F. S., as amended by Ch. 70-134, Laws of Florida?

Chapter 70-134, Laws of Florida, amended some thirty-odd statutes to increase the fees (now called "service charges") theretofore allowed for the services of the circuit court clerks prescribed by such statutes. Section 45.031, F. S., was expressly included and amended by Ch. 70-134. Section 702.02, F. S., was not. Under the maxim *inclusio unius est exclusio alterius*, it is presumed that, where a statute expressly repeals or amends several specific acts, it was not intended to repeal or amend others not specified. See *American Bakeries Co. v. Haines City*, Fla. 1938, 180 So. 524, 534. Accord: AGO 070-78 of this publication.

I have not overlooked the fact that Ch. 70-134, Laws of Florida, contains a general repealer clause. However, this clause is ineffective unless some actual conflict is found. As stated in *Sutherland's Statutory Construction*, § 3012, p. 466: "An express general repealing clause to the effect that all inconsistent enactments are repealed, is in legal contemplation a nullity. Repeals must either be expressed or result by implication."

The Supreme Court of Florida follows the general rule with respect to repeals by implication: The earlier act remains in force unless the two are manifestly inconsistent with and repugnant to each other. See *Sanders v. Howell* 1917, 73 Fla. 563, 74 So. 802. Accord: AGO 058-53, Feb. 17, 1958, Biennial Report of the Attorney General, 1957-1958, p. 536. An act that changes the fees for a great many services performed by the circuit court clerks by expressly amending the statutes providing for such fees and leaves unchanged the statute providing for and setting the fee for a mortgage foreclosure sale contains no inconsistency. Thus, Ch. 70-134, Laws of Florida, did not, in and of itself, have the effect of amending § 702.02, F. S. So the real question is whether or not § 45.031, F. S., had the effect of repealing § 702.02. If it did, then the circuit court clerks are, of course, entitled to the new fee provided by § 45.031, as amended by Ch. 70-134. When considered in the light of the history of the statutes and their express provisions, it must be concluded that § 45.031 was not intended to, and did not, repeal § 702.02.

Section 702.021, F. S., was enacted by Ch. 29700, Laws of Florida, 1955, to provide an alternative procedure for the foreclosure of mortgages. When the uniform commercial code was adopted in this state (Ch. 65-254, Laws of Florida, effective January 1, 1967) it expressly preserved Ch. 702, F. S., except when inconsistent or in conflict with the Uniform Commercial Code. See § 680.104(3), F. S. Section 45.031, F. S., was adopted in 1967 as a part of Ch. 67-254, Laws of Florida, which is the comprehensive revision of the statutes on civil practice and procedure. It provides that "in any sale of real or personal property under an order or judgment, the following procedure may be followed as an alternative to any other sale procedure if so ordered by the

court." The procedure prescribed is substantially identical to that provided by § 702.02, F. S.; and, as originally enacted, the same \$10 fee was prescribed. It is significant that, in codifying the laws prescribing the procedures for a great many civil actions (now contained in some fourteen chapters of the Florida Statutes) Ch. 67-254 left untouched the procedure prescribed by Ch. 702, F. S., for mortgage foreclosures. I conclude that the Civil Practice and Procedure Act—including what is now § 45.031—was not intended to, and did not, repeal the provisions of law respecting mortgage foreclosure proceedings and mortgage foreclosure sales as provided by Ch. 702. Thus, the fee prescribed by § 702.02 is the one to which the clerk is entitled in a mortgage foreclosure sale.

070-89—July 27, 1970

### TAXATION

#### LIMITATIONS ON THE MAKING OF CORRECTIONS TO INTANGIBLE PERSONAL PROPERTY TAX ROLLS

To: *David L. Reid, Tax Assessor, West Palm Beach*

#### QUESTION:

When is the deadline for the making of corrections on a return of intangible personal property by a taxpayer under § 199.201, F. S.?

The deadline for making such corrections is the tax delinquency date of the year following the year in which the return should have been filed originally. This conclusion is based on a comparison of the various statutes dealing with procedures for filing returns and making assessments. The corrections allowed under § 199.201, F. S., provide opportunity for the taxpayer to insure that his return for that year is accurate, in accordance with the theory that constitutional and statutory provisions encompassing intangible personal property taxes "recognize the inherent difference in rules that must govern the assessment of tangibles and intangibles . . . [and should be] administered in a way to encourage owners of intangibles to bring them out for assessment." *Root v. Wood* 1945, 155 Fla. 613, 21 So.2d 133, 138.

Section 199.101, F. S., reads as follows:

It is hereby made the duty of every person, firm, or corporation in this state owning or having control, management, or custody of intangible personal property which is subject to taxation under the laws of Florida . . . to file a sworn return of the same with the county assessor of taxes, in the proper county on or before April 1 of each and every year, giving the character, description, location and just valuation of same according to the best of the knowledge and belief of the person making the return. . . . (Emphasis supplied.)

Pertinent provisions of § 199.201 F. S., state:

... After the assessment roll has been delivered by the tax assessor to the tax collector, the tax assessor shall, on request, permit a person who should have filed a return or who desires to file an amended return, to file an intangible personal property tax return, or amended return and the tax assessor shall receive such return and immediately assess the taxes due on the intangible personal property of the taxpayer and the tax

assessor shall thereupon immediately file an amendment to the assessment roll and certify the same to the tax collector who shall, on request of the taxpayer, permit him thereupon to pay the tax . . . .

\*Section 199.321, F. S., provides:

If any intangible personal property is not returned for taxation by the persons required to return it, within the time and in the manner required by this chapter; or if any intangible personal property is returned at less than its just valuation as defined in this chapter; there shall be added as a part of the tax a penalty in the amount of ten per cent of the tax found to be due, and an interest of one per cent per month from the date the tax should have been paid. [Amended effective 1971 by § 13, Ch. 70-243, Laws of Florida, substituting new § 193.072, F. S., for clarification, apparently contemplating discretionary waiver of penalty.]

While taxes on intangible personal property are "due and payable on November 1 of each year, or as soon thereafter as the personal property assessment roll shall come into the hands of the tax collector," (§ 199.181, F. S.), taxes on intangible personal property are not deemed delinquent until April 1 of the year following that for which the assessment was made. (§ 199.211, F. S.) Although no deadline date is specifically stated in § 199.201, F. S., April 1 would appear to be implied by viewing the statute in conjunction with the related procedural and enforcement provisions.

An intangible property tax return under the current law was to be filed by April 1. Both the provision for corrected returns and the sections relating to delinquent taxes are intended to encourage the taxpayer to present intangibles for assessment and to insure that the assessment is for just value. Interest is applicable to taxes on improperly reported and unreported intangible property as of the delinquency date of the year following the year in which the returns should have been made. The provision for corrected returns allows the taxpayer to insure that all assessments shall be accurate on his intangible personal property for that year and thus encourages accurate returns up to the date that the delinquency provisions take effect. To extend the correction period further than the date when the taxes, based on approved assessments, becomes delinquent would be to erase the coercive effect of the provisions applicable to assessments after that date, and to render inoperative in most instances the prescribed procedures for orderly back assessment. (§ 199.311, F. S.) In the absence of any such express language in § 199.201, F. S., an extension of its terms past the delinquency date therefore would not be in accord with the principles of presumed intent that all statutory provisions have a sphere of effective operation.

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\*Note.—§ 49, Ch. 70-243, repealed § 199.321, effective January 1, 1971.

070-90—July 28, 1970

## CRIMINAL PROCEDURE

TRANSFER OF A CHARGE OF VIOLATING A  
MUNICIPAL ORDINANCE TO THE COUNTY  
JUDGE'S COURT PURSUANT TO § 932.61,  
F. S.—PROCEDURE BY NONELECTIVE  
PROSECUTING ATTORNEY*To: Warren O. Tiller, County Prosecutor, Daytona Beach*

## QUESTION:

When, pursuant to § 932.61, F. S., a charge of violating a municipal ordinance, which violation is also a violation of state law, is transferred to a county judge's court which has a nonelective prosecuting attorney, does § 932.63, F. S., empower such prosecuting attorney to file in the county judge's court an information charging such state law violation?

Senate Bill 288 (1970) became a law as Ch. 70-372, Laws of Florida. It added §§ 932.61-932.66, F. S. Said § 932.61 provides as follows:

932.61 Transfer of county or municipal charge to court providing trial by jury.—A person charged in a court with a violation of a county or municipal ordinance for which no jury trial is provided may, when the violation of a county or municipal ordinance is also a violation of a state law, cause the transfer of the violation to the appropriate court in which a trial by jury is provided, in the following manner:

(1) Prior to the commencement of the trial in the court not providing trial by jury, the person charged, or his attorney, shall file a petition requesting transfer to the appropriate court providing trial by jury. The original petition shall be filed with the court where the charge is docketed and pending, and copies shall be furnished to the court where jury trial is provided and to the prosecuting authority of both courts.

(2) The petition shall be signed by the defendant or his attorney and shall contain:

- (a) The defendant's name, age, and address;
- (b) A description and citation of the charges filed against the defendant;
- (c) A citation indicating that these charges also constitute a violation of state law;
- (d) The date and amount of bond set, if any;
- (e) An agreement to appear, answer, and attend the court to which the charge may be transferred;
- (f) The date of incarceration, if incarcerated at the time of the making of the petition; and
- (g) The demand for trial by jury.

(3) The judge of the court in which the person is charged shall entertain defendant's petition forthwith and shall, upon finding the petition to be correct in all its allegations of fact, order by written endorsement on the petition the transfer of defendant's cause to the appropriate court providing criminal jury trial jurisdiction.

(4) The clerk of the court not providing trial by jury, upon receipt of the judge's order directing transfer, shall within three days transmit to the clerk of the court providing criminal



jury trial jurisdiction all the original record materials, including bond and the petition to transfer, filed in the petitioner's cause, certifying that they are all the original papers filed in the cause and kept by the clerk. The clerk of the court not providing trial by jury shall also transmit copies of all the record materials to the prosecuting attorney of the court providing jury trial jurisdiction to which defendant's cause is being transferred. The clerk shall also furnish notice of transfer to the surety or bail bondsman, if there is one. Upon the entry of the order transferring the cause, it shall be the duty of the police authority of the court from which the cause is being transferred to transfer a complete and exact duplicate of all reports, records, and other papers relating to the cause to the prosecuting attorney of the court to which the cause is transferred.

Said § 932.63, F. S., provides:

**932.63 Filing of charges; petitioner not incarcerated.**—If the petitioner is not incarcerated, *the prosecuting attorney shall*, within thirty days of receipt of the petition, after due and diligent consideration and investigation of defendant's cause, *file charges on behalf of the state against the defendant in the court providing criminal jury trial jurisdiction*, or shall decline to file charges against the defendant, and the cause shall be dismissed upon the filing of a no true bill by the prosecuting attorney with the clerk. Upon failure of the prosecuting attorney to take action within thirty days, the cause shall be dismissed by the clerk of the court in which the cause is pending. (Emphasis supplied.)

Historically, nonelective prosecuting attorneys for county judge's courts have never had the authority to file informations.

Whatever might be thought as to whether the legislature intended that said § 932.63, F. S., should confer on such nonelective prosecuting attorneys authority to file informations in transferred cases, I do not think that said statute confers any such authority.

Article V, § 3, State Const., commands that: "The practice and procedure in all courts shall be governed by rules adopted by the supreme court." Pursuant to said constitutional mandate, the Supreme Court has adopted Criminal Procedure Rules, among which is Criminal Procedure Rule 1.140, the pertinent part of which provides:

#### **RULE 1.140 INDICTMENTS, INFORMATIONS AND AFFIDAVITS**

##### **(a) Methods of Prosecution.—**

(1) **Capital Crimes.**—An offense which may be punished by death shall be prosecuted by indictment.

(2) **Other Crimes.**—The prosecution of all other criminal offenses shall be as follows:

In Criminal courts of record and in the Court of Record of Escambia County, prosecution shall be solely by information; in County Judge's Courts having elective prosecuting attorneys, by indictment, information or affidavit; in all courts not hereinabove mentioned which have elective prosecuting attorneys, by indictment or information; and in courts not having elective prosecuting attorneys, by indictment or affidavit . . . (Emphasis supplied.)

In its order of March 1, 1967, adopting the Criminal Procedure Rules, the Supreme Court said: "Appended to this Order is a complete compilation of the Florida Rules of Criminal Procedure adopted

*pursuant to the power vested in this Court by Article V of the Florida Constitution. . . .*" (Emphasis supplied.)

Since said Criminal Procedure Rule 1.140 was adopted pursuant to the power vested in the Supreme Court by Art. V, § 3, State Const., it must be given effect; it would control even if it were clearly in conflict with § 932.63, F. S.

Said Rule will not permit a nonelective prosecuting attorney for a county judge's court to file an information in a case transferred to that court pursuant to § 932.61, F. S.

I note your inquiry as to whether § 3 of Senate Bill 288 (now Ch. 70-372) would cure any prior limitations upon your authority. Said § 3 did not, and could not, have any effect upon Criminal Procedure Rule 1.140, which limits your authority as the nonelective prosecuting attorney for the county judge's court of Volusia County by, in effect, prohibiting you from filing informations.

The only ways in which a nonelective prosecuting attorney for a county judge's court can file charges pursuant to § 932.63, F. S., are: (1) to proceed in accordance with § 937.011, F. S., where applicable; and (2) to procure the officer or other person who made the original ordinance violation charge, or someone else having knowledge of the facts, to execute an affidavit charging the offense against state law and by then filing such affidavit in the county judge's court.

Your question is answered in the negative.

070-91—July 29, 1970

#### ELECTION CODE

##### REGISTRATION TO VOTE—PRIOR TO ATTAINING 21st BIRTHDAY—RESIDENCE REQUIREMENTS

To: Alma Bethea, Supervisor of Elections, Gainesville

#### QUESTION:

May a person who is a permanent resident of Florida register to vote prior to attaining age 21, either in his county of permanent residence or in a county other than that of his permanent residence in which he has resided or will have resided for a period of 6 months?

Statutes relating to registration to vote and qualifications to become electors should be liberally construed to permit all persons eligible to exercise this most fundamental democratic right to participate in the election process. Every effort should be made to facilitate and expedite procedures so the greatest number of persons may vote for their personal choice of elected officials exercising governmental authority.

Our nation, state, and local governments exist solely by the consent of the governed. Unnecessary and cumbersome impediments burdening the processes through which that consent is given must be kept to an absolute minimum and swept away wherever possible.

Although the organic law of Florida precludes voting prior to attaining age 21, Art. VI, § 2, State Const., as revised in 1968, such is not the case insofar as preparation for exercise of that most precious right is concerned.

The legislature in its wisdom recognized the significance and importance of the elective process to young people. It authorized persons, including students, who are permanent residents of the state to register to vote when such individuals will attain age 21 prior to the next succeeding primary, special primary, general, or special general election.

The legislature also provided for prospective registration of those individuals who have not fulfilled the statutory residence requirements at the time the registration books close but who will fulfill such requirements prior to the next succeeding primary, special primary, general or special general election.

Examination of the following language of the legislative pronouncement on the subject reveals an intention to afford registration on a prospective basis. Section 97.041, F. S., provides in part:

(1) Any person twenty-one years of age or any person who will attain age twenty-one prior to the next succeeding primary, special primary, general or special general election, upon proof of his birthdate, who is a citizen of the United States, a permanent resident living in Florida for one year residing in the county where he wishes to register for six months, is eligible to register with the supervisor when the registration books are open.

(2) A person who has not attained the age of twenty-one at the time the registration books close, but who will attain such age prior to the next succeeding primary, special primary, general or special general election and meets the other requirements of subsection (1), may register during the sixty days prior to the closing of the registration books next preceding his twenty-first birthday.

(3) A person who has not fulfilled his residency requirements at the time the registration books close, but who will fulfill such residency requirements prior to the next succeeding primary, special primary, general or special general election and meets the other requirements of subsection (1) or comes within the purview of subsection (2) may register during the sixty days prior to the closing of the registration books next preceding the date on which his residency requirements will be fulfilled.

Section 97.041(4), F. S., authorizes the supervisor of elections to require satisfactory proof of an applicant's qualifications.

It has been held that " 'residence' is not synonymous with 'domicile'; sometimes the word 'residing' is synonymous with the word 'sojourn'; generally 'residents' are somewhere between persons just passing through a place and persons who are permanent inhabitants thereof." In *re Yap* 1963, 241 N.Y.S. 2d 976, 978, 39 Misc. 2d 835, and that the "word 'residing' indicates some intent of permanency of occupation as distinguished from boarding or lodging, but does not require intent of permanency to degree required in 'domicile.'" *State Farm Mut. Auto. Ins. Co. v. Hanna* 1964, 166 So.2d 872, 876, 277 Ala. 32.

It is also recognized that the act of residing can be separate and apart from legal residence or domicile where an act of a legislature

... providing for qualifications to vote in annexation election intended by use of word "residing" to limit right to vote on issue of annexation to those registered qualified electors actually residing in municipality and in territory proposed to be annexed at time of election, as distinguished from those who had legal domicile in such area but were actually residing elsewhere. *Creamer v. City of Anderson* 1962, 124 S.E. 2d 788, 240 S.C. 118.

The Florida legislature in several instances has seen fit to waive or modify the disabilities of nonage for particular purposes, Cf. §§ 741.06; 627.0123; 631.281; 627.01051; 743.01-743.03; 743.05 and 295.13, F.

S., and for the purpose of registration to vote the legislature has modified the disability of nonage in those instances where the minor will become 21 years of age prior to the next succeeding primary, special primary, general, or special general election.

The reference statutes and authorities negate the requirement, which I am advised is imposed by some supervisors of elections as a condition precedent to registration, that one seeking to register declare positive intention to become a permanent resident and to reside in the county of registration for a prescribed period of time. There is no statutory requirement that the minor intends to become a permanent resident of the county in which he seeks to register; if the residence requirement of § 97.041, F. S., is satisfied, registration should not be withheld.

Thus, a person who is a permanent Florida resident and journeys to another Florida county and resides therein for a period of 6 months, or will have resided therein for a period of 6 months at the time of the next election, may register to vote in the county where such 6 months residency will be or has been established. Further, a minor who will attain age 21 prior to the next election for which he seeks to register and has satisfied the above residency requirement may register to vote, notwithstanding his ineligibility to vote prior to actually attaining 21 years of age.

070-92—July 29, 1970

#### MUNICIPAL FIREMEN

#### AUTHORITY OF MUNICIPALITY TO PURCHASE BLANKET ACCIDENT AND HEALTH INSURANCE FOR ITS FIREMEN, ALL VOLUNTEERS

To: Ben F. Barnes, Campbellton Town Attorney, Marianna

#### QUESTION:

Is the Town of Campbellton authorized to purchase a blanket accident and health insurance policy for its volunteer firemen?

The town's fire department is composed entirely of volunteers who serve without pay. Section 167.421, F. S., authorizes municipalities to provide group insurance—including health and accident insurance—for "its employees and officers." The statute does not mention volunteer workers who serve without pay—either to include them within or exclude them from the terms of the act. It does provide, however, that an officer or employee who elects to come within the insurance coverage may have the amount of the premium chargeable to him deducted from his wages. Provision is also made for the municipality to pay "any portion or all of the premiums or cost of any group insurance" taken out under the authority of the statute.

I am unable to find an opinion of an appellate court or of this office on the particular question here presented. In a somewhat analogous situation—workmen's compensation coverage—it has been held by this office in AGO's 041-520 Aug. 12, 1941, Biennial Report of the Attorney General, 1941-1942, p.567, and 068-36 Mar. 11, 1968, Biennial Report of the Attorney General, 1967-1968, p. 225, and by the Florida Sup. Ct. (*Wolf v. City of Altamonte Springs*, Fla. 1962, 148 So.2d 13) that an employer-employee relationship through the payment of at least a token consideration for the services must be established to entitle a volunteer worker to the medical benefits and remedial treatment provided by the city's workmen's compensation coverage.



The two statutes dealing specifically with firemen—§ 112.191 and Ch. 175, F. S.—expressly refer to volunteer firemen. Thus, § 112.191 expressly *excludes* volunteer firemen from the death benefits awarded by that statute to firemen who lose their lives in the course of their duties. On the other hand, § 175.032, F. S., expressly *includes* within the municipal pension trust fund retirement benefits provided for therein “any volunteer fireman whose name is carried on the active membership rolls as a volunteer fireman of any duly constituted volunteer fire department . . . of any municipality, and whose duty it is to extinguish fires and to protect life and property therefrom. Token or other pension or compensation for services rendered by such volunteer firemen shall not take them out of the volunteer firemen category.”

It is noteworthy that in the statute that excludes volunteer firemen from the death benefits provided by § 112.191, F. S., the premiums for such coverage are paid entirely by the governmental agency by whom the firemen are employed, whereas the statute providing a municipal retirement plan for all municipal firemen, including volunteers, authorizes the city to require its employees to contribute to the pension trust fund, and also apparently contemplates that volunteer firemen will be paid a token salary. See §§ 175.032 and 175.162, F. S., providing for the retirement benefits to be paid a volunteer fireman based upon “his average final compensation as a volunteer fireman.”

In these circumstances, it cannot be said with any degree of certainty that the legislature intended that a municipality could extend to its volunteer firemen the privilege of participating in its group health and accident insurance program, in the absence of some token employer-employee relationship represented by the payment of a nominal salary—which conceivably could be the amount of the employee's required contribution to the group insurance program.

070-93—July 30, 1970

#### TAXATION

##### DOCUMENTARY STAMP TAX—NOTES TO STATE—CHARTERED POSTAL CREDIT UNION, § 201.08(1), F. S.

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

#### QUESTION:

When documents within the purview of § 201.08(1), F. S., are made and executed in a federal post office, located in Florida, by postal employees to a credit union designed for such personnel, are such documents subject to documentary stamp tax imposed by said § 201.08, F. S.?

Considering the facts as presented, the answer is in the affirmative. The vital element for tax immunity in such situations is that of being a federal agent or instrumentality. *Graves v. People of New York ex rel. O'Keefe* 1938, 306 U.S. 466. It may be noted that while federal credit unions are deemed federal agencies, they are granted this status through specific congressional action. 12 U.S.C., §§ 1767, 1768; AGO 057-21, Jan. 21, 1957, Biennial Report of the Attorney General, 1957-1958, p. 23. However, a postal credit union if only state chartered, has none of the essential aspects of a federal credit union. 12 U.S.C. §§ 1753, 1754, 1767, 1768. As a state, not federal, creation, it is not exempt from application of the documentary stamp law.

Prior opinions of the Attorneys General support this conclusion. Of specific relevance are AGO 063-136, Nov. 13, 1963, Biennial Report of the Attorney General, 1963-1964, p. 203, (dealing with federal credit unions on military reservations), AGO 061-84, May 19, 1961, Biennial Report of the Attorney General, 1961-1962, p. 135, (concerning Veteran Administration loans), AGO 057-21, Jan. 24, 1957, Biennial Report of the Attorney General, 1957-1958, p. 22, (re federal credit unions in general) and AGO 056-231, Aug. 7, 1956, Biennial Report of the Attorney General, 1955-1956, p. 761, (farmers home administration loans). In each of these the decision of immunity was based on a finding of the prescribed standard of federal agent or instrumentality performing a federal function.

There is no absolute standard to be applied in deciding whether or not an agency is an instrument of the government. Some important factors to be considered are whether it was created by the government, whether it is wholly owned by the government, and whether or not it is primarily engaged in the performance of some essential governmental function. *Unemployment Compensation Commission v. Wachovia Bank & Trust Co.* 1939, 215 N.C. 491, 2 S.E. 2d 592, 596. The postal credit union considered here meets none of these standards.

It should be noted that the federal instrumentality immunity is a limited one. It applies only to governmental functions of a federal agency. AGO 061-84, as mentioned above. It does not extend to outside parties dealing with the federal agency (*Plymouth Citrus Growers Association v. Lee* 1946, 157 Fla. 893, 27 So.2d 415), nor does it inure to federal agencies performing nongovernmental functions. AGO 061-84, as mentioned above.

The situs of a postal credit union is but one facet of its existence, and is not determinative of its designation as a federal agency. Situs is useful only in determining a government function when a congressionally appointed agency is involved. Cf. AGO 063-136, as mentioned above. An example of this would be the facts of AGO 063-136 where an acknowledged federal agency (a federal credit union) was performing its function on a federal military reservation.

Simply because a postal credit union occupies space in a federal post office building does not equate its circumstances and role with those of a federal agency performing its federally authorized function on a federal reservation.

A postal credit union which is state-chartered is responsible for its state obligations and privileges. The documentary stamp tax is "an excise tax levied with respect to the creation of instruments within the state . . . It is simply a tax levied in relation to an act done within the state in making an instrument." *Graniteville Mfg. Co. v. Query* 1931, 283 U.S. 376, 75 L.Ed. 1126. As a state creation performing a function allowed by the state, the postal credit union's notes within the purview of § 201.08(1), F. S., are therefore subject to the documentary stamp tax required by said section.

070-94—July 30, 1970

## COUNTY GOVERNMENT

### BOARD OF TAX ADJUSTMENT—APPOINTMENT OF ALTERNATE MEMBERS—PAYMENT OF COMPENSATION AND EXPENSES

To: *Sidney A. Stubbs, County Attorney, West Palm Beach*

#### QUESTIONS:

1. May the county provide, by ordinance, for alternate members of the board of tax adjustment?

2. Are expenses for court reporters, special masters, and arbitrators in connection with administrative equalization of tax assessments necessary expenditures for which county funds may be budgeted and paid out?

3. May the county require a filing fee as a condition precedent to the filing of a petition for administrative review of a tax assessment?

4. Are the members of the board of tax adjustment and the clerk of the circuit court entitled to additional compensation and expense money for services connected with the work of the board?

5. Is the board entitled to employ an attorney?

The board of tax adjustment created by Ch. 69-140, Laws of Florida (now § 194.015, F. S.), takes the place of the old board of equalization—that is to say, the board of county commissioners sitting as a board of equalization—in equalizing tax assessments, as well as in deciding questions relating to homestead and other tax exemptions. The board now consists of two members of the school board and three members of the board of county commissioners, to be designated by the chairmen, respectively, of these two boards. However, its functions remain essentially the same as when performed by the board of county commissioners; and, like its predecessor, it is still an agency of the county “established to carry into effect the general rule of equality and uniformity of taxation required by the constitutional or statutory provisions.” 84 C.J.S., *Taxation*, § 512, p. 979, quoted in *Stiles v. Brown*, Fla. 1966, 182 So.2d 612, and AGO 062-134, Oct. 17, 1962, Biennial Report of the Attorney General, 1961-1962, p. 582. The questions here presented are answered in the light of this basic premise.

#### AS TO QUESTION 1:

Section 194.015, F. S., was amended by § 26 of Ch. 70-243, Laws of Florida, to provide that the members of the board of tax adjustment “may be replaced from time to time by other members of their respective boards on appointment by their respective chairman.” This would appear to be ample authority for the chairmen, respectively, of the board of county commissioners and the district school board to designate a member of his board to serve in the stead of a member who is unable to attend a meeting. Your question is answered accordingly.

#### AS TO QUESTION 2:

Section 194.032(4), F. S., providing for the appointment of a special master to hear the testimony in any tax adjustment proceeding, was amended by § 27 of Ch. 70-243, Laws of Florida, to add the following provision: “The expense of hearings before special masters and any compensation of special masters shall be borne three-fifths by the board of county commissioners and two-fifths by the school board.” Your question is answered accordingly as to special masters.

Section 194.032(3), F. S., as amended by § 27 of Ch. 70-243, Laws of Florida, provides that the hearings before the board of tax adjustment shall be conducted informally, but that “the board, the petitioner, or the tax assessor may require that a verbatim record of the proceedings be made and that proof of any documentary evidence be presented.” No provision is made for the payment of the expense of recording the proceedings. It would seem, however, that the expense of recordation (or of preparing a copy of the transcript of record) should be borne by the party at whose request the recordation (or the copy of the transcript) was made. It would seem also that any expense properly

chargeable to the board in this respect—as, for an example, where the recordation is at the request of and for the benefit of the board—may be considered a necessary expenditure of the board in connection with its duty and authority under the statute and that public funds may properly be budgeted and expended therefor. Cf. *State ex rel. Himes v. Culbreath*, Fla. 1937, 174 So. 422; and *Peters v. Hansen*, Fla. App. 1963, 157 So.2d 103. As noted above, the expense of hearings before special masters (which would presumably include the cost of reporting the proceedings for the use of the board in rendering its decision) is to be borne jointly by the county commissioners and the school board in a three-to-two ratio. And the board might well conclude that the expense incurred by the board in connection with the recording of its own hearing could be allocated in the same proportion. Your question is answered accordingly as to court reporters.

Section 194.033, F. S., as amended by § 28 of Ch. 70-243, Laws of Florida, provides that “any cost of arbitration shall be assessed by a majority of the arbitrators against the county and school board, the taxpayer, or both, as they deem appropriate.”

Your question is answered accordingly as to arbitrators.

#### AS TO QUESTION 3:

A “fee” is a charge fixed by law for the services of a public official or for the use of a privilege under the government’s control. *Flood v. State* 1928, 117 So. 385, 95 Fla. 1003. Public officers have no legal claim for official services rendered except when, and to the extent that, compensation is provided by law; and when no compensation is provided, rendition of such services is deemed to be gratuitous. *Gavagan v. Marshall* 1948, 33 So.2d 862, 160 Fla. 154. Accord: AGO 067-44, July 19, 1967, Biennial Report of the Attorney General, 1967-1968, p. 71. The statute does not authorize the board of tax adjustment to require a filing fee in connection with a petition for equalization of an assessment or any other proceedings of which it has jurisdiction. Nor can any other statutory authorization for requiring such a filing fee or service charge be found. Therefore, this question is answered in the negative.

#### AS TO QUESTION 4:

The duties of the members of the board of tax adjustment are performed *ex officio* by the members of the board of county commissioners and the school board, respectively, as are the duties of the clerk. No statutory provision for additional compensation is made. This being so, the salary provided by law for their regular services must have been intended by the legislature to cover also their additional *ex officio* duties. See *Gavagan v. Marshall* 1948, *supra*, 33 So.2d 862, and cases cited.

As to travel expenses: The members of the tax adjustment board and the clerk would be entitled to reimbursement for such travel expense as is authorized by § 112.061, F. S., and subject to such rules and regulations as are applicable. See § 112.061(10), F. S., as to the clerk and the county commissioner members and § 230.201, F. S., as to school board members. The provisions of any special or local law as to travel expense would prevail over any conflicting provisions of § 112.061 to the extent of such conflict. Section 112.061(1)(b), F. S. It appears that the school board members in Palm Beach County are not on a salary basis but receive a sum that might be in the nature of a *per diem* for each school board meeting attended. Whether or not this *per diem* could be paid to such member for his attendance at a tax adjustment board meeting would depend upon the wording of the special or local act authorizing such payment. Your question is answered accordingly.



## AS TO QUESTION 5:

The statute makes no provision for the employment of an attorney by the board of tax adjustment; and it is, of course, a general rule that administrative officers and agencies have no common law or inherent powers and may exercise "only such jurisdiction or powers as have been granted to or conferred on them by law, either expressly or by implication." 73 C.J.S., *Public Administrators*, § 48, p. 367.

Here, the question presented concerns a public agency charged with important duties and responsibilities in connection with the fiscal affairs of the county. If the board should find it necessary to employ an attorney to assist it in the performance of such duties and responsibilities, it would seem that it would have the authority to do so, by necessary implication, cf. *Dick v. State*, Fla. App. 1963, 153 So.2d 844, and AGO 070-80, of this publication, the expense of which would be payable the same as other expenses of the board from such funds as are available therefor. Your question is answered accordingly.

070-95—July 31, 1970

## TAXATION

SCHOOL MILLAGE—RESPONSIBILITY FOR PAYMENT OF  
COMMISSIONS FOR PERIODS, JAN. 1, 1970-JUNE 30, 1970,  
AND REMAINDER OF YEAR 1970  
COMMENCING JULY 1, 1970

To: *Rivers Buford, Counsel, State Board of Education, Tallahassee*  
QUESTION:

Will the district school board be responsible for the payment of commissions for assessing and collecting taxes for the calendar year 1970?

The question is answered in the affirmative as to commissions attributable to the period Jan. 1, 1970 through June 30, 1970. AGO's 069-47, 069-51, of this publication.

My prior opinion based on law in effect until June 30, 1970, was "that school taxes levied under Art. IX, Sec. 4, Fla. Const. 1968, are district taxes controlled by the provisions of Sec. 193.65(4), F. S., which makes the board of county commissioners responsible only for "commissions for assessing and for collecting the county taxes" and states that commissions for "all other district taxes . . . shall be audited and paid by the governing board . . . having charge of the financial obligations of such district."

Although the applicable language from § 193.65(4)[§ 192.091(4)], F. S., remains the same, I conclude that Ch. 70-246, Laws of Florida, enacted by the 1970 legislature, which became a law without the governor's signature on June 30, 1970, effective July 1, 1970, makes the board of county commissioners responsible for commissions payable for the period after July 1. Section 193.65(1) and (2)[§ 192.091(1),(2)], F. S., are amended to read in part: "For the purpose of this subsection the commissions on the nonvoted school millage shall be paid by the county commissioners."

Because the act contains no provision for retrospective application, it does not, in my opinion, affect the obligation of the district school board to pay the commissions in question for half of the year 1970.

Section 6(a) of Ch. 70-243, Laws of Florida(§ 192.091, F. S.), effective after June 30, 1970, also makes certain changes in the computation of assessors' commissions under § 192.091(1), F. S.,

formerly § 193.65(1), F. S., but apparently does not affect the issue raised by your letter. Nor does that question appear to be affected by § 7 of this act (§ 192.102, F. S.), effective Jan. 1, 1971, consolidating former §§ 192.101, 192.114 and 192.122, F. S., and amending the advance payment provisions for assessors' and collectors' commissions, discussed in AGO 069-109, to refer to both the boards of county commissioners and the county school boards. These provisions relate in terms to method of payment and not directly to ultimate responsibility for such.

Chapter 70-246, Laws of Florida[§ 192.091, F. S.], provides only that as of July 1, 1970, the commissions on nonvoted school millage shall be paid by the county, and does not state or imply that the county shall pay all commissions for assessment and collection of that millage for the year 1970. Any ambiguity or practical difficulty in applying the statute appears to be the result of legislative oversight in failing to provide expressly that commissions for the entire year should or should not be paid by the county. There appears to me to be no alternative to my conclusion above, that the statutes divide the obligation for payment of the commissions for the current year equally between the county and Board.

070-96—August 3, 1970

#### COUNTY OFFICES

##### SHERIFFS—INCREASED COMPENSATION AUTHORIZED PURSUANT TO CH. 70-395, LAWS OF FLORIDA

To: *John A. Madigan, Jr., Attorney, Florida Sheriffs Association,  
Tallahassee*

#### QUESTION:

Are the sheriffs of this state entitled to the full amount of the salary increase awarded by Ch. 70-395, Laws of Florida, as of January 1, 1970?

There appears to be little, if any, ambiguity in the terms of Ch. 70-395, Laws of Florida(§ 145.071(3), F. S.), expressly providing that the salary scales therein enumerated "are deemed to have taken effect on and shall operate retroactively to January 1, 1970"—which, in my opinion, indicate a legislative intent that the sheriffs of this state are to receive the full amount of the salary increase therein provided, starting Jan. 1, 1970.

I have not overlooked the fact that this interpretation of the 1970 Act brings it into conflict with § 145.121(2)(b), F. S. (amended by Ch. 70-445, Laws of Florida, in respects not here relevant), requiring the implementation of the salary increases provided by Ch. 69-346, Laws of Florida (carried forward as § 145.071, F. S., as to Sheriffs) at the rate of twenty percent per year. However, Ch. 69-346 was a broad comprehensive statute establishing a uniform rate of compensation for the various county officials referred to therein, including sheriffs; whereas, the later 1970 Act deals with a particular aspect of the subject matter provided for generally in the earlier act.

It is well settled that a statute relating to the particular part of the general subject will operate as an exception to, or qualification of, the general terms of the more comprehensive statute to the extent of the repugnancy, if any. *Adams v. Culver*, Fla. 1959, 111 So.2d 665, 667, and cases cited. Accord: *Hisgen v. Raleigh*, Fla. App. 1959, 115 So.2d 715, 719; *Woodley Lane, Inc. v. Nolen*, Fla. App. 1962, 147 So.2d 569,

571. In the light of this rule, the inconsistent provisions of the later and more particular statute will control over those of the earlier comprehensive statute. Accordingly, your question is answered in the affirmative.

070-97—August 3, 1970

### ELECTORS AND ELECTIONS

#### VOTER REGISTRATION—RESIDENCE AND AGE REQUIREMENTS—§ § 97.041(4) AND 222.17, F. S.

To: *Wilma S. Sullivan, Supervisor of Elections, Tallahassee*

#### QUESTIONS:

1. At what age and under what circumstances may a student paying out-of-state tuition declare his or her intent to become a permanent resident of the State of Florida?

2. May the Declaration of Domicile form, as prescribed in § 222.17, F. S., be used as positive proof of residence as required by § 97.041(4), F. S.?

3. May a person who does not own real property declare a domicile as prescribed by § 222.17, F. S.?

4. May a minor declare residency other than that of his parents or legal guardian?

#### AS TO QUESTION 1:

Your inquiry directs attention to the oft misunderstood and confusing application of the theories of disabilities of nonage. It is fundamental that in absence of statute or certain conduct having legal consequences, such as abandonment of a child by parents or a minor foraging for himself to provide the necessities, persons who have not obtained their majority, viz., in Florida age 21, lack legal capacity to change their residence.

In Attorney General's Opinion 070-91 of this publication, considering § 97.041, F. S., it was held the legislature had waived the disability of nonage to permit a permanent Florida resident who journeys to another Florida county, residing therein for a period of six months or who will have resided therein for a period of six months at the time of the next election, to register to vote. Further modification was had to permit such persons who will attain age 21 prior to the next election to register to vote.

While § 97.041, F. S., has escaped judicial construction of the questions of residence raised under its provisions, other jurisdictions have considered many of the problems as applied to the exercise of the right to register to vote by individuals who might normally be considered nonpermanent residents of the state. Particular reference has been made to the student who has gone away to college and wishes to vote in the county where he attends school.

When the evidence shows that a student who has gone away to college intends to return to his former home, the courts uniformly hold that no residence is acquired in the school town for voting purposes.

\* \* \* \* \*

Attendance at school may be accompanied by an intent to make that place one's new home. When a student's actions and conduct in the school town manifest such an intent, the courts

recognize his right to vote from his college residence, constitutional or statutory provisions on residence of students notwithstanding.

\* \* \* \* \*

The student who gives the most usual answer when his right to vote in a college town is challenged—that his plans as to a future residence are uncertain, and depend upon employment and other opportunities, but that he considers the town his home for the present and has no intention of returning to his parents' home—will also be allowed by the courts in most states to vote in his college town. 98 A.L.R. 2d *Voting Residence—Student—Teacher*, § § 4-6, 494-498.

It would appear that the answer to question 1 is best considered in *Chomeau v. Roth* (1934) 230 Mo. App. 709, 72 S.W. 2d 997, where:

Two hundred nineteen votes cast by students at a theological seminary were enough to swing the result of an election . . . . In determining that the students were eligible to vote, the court did not try to consider the intention of each individual student as to residence, but based its decision upon the question of the qualifications of the student body generally, in the light of the nature and character of the seminary itself. All the students were Lutherans who came to the seminary from all parts of the country for a theological course of at least 3 years. They left home with the intention of not returning permanently, and upon graduation would be subject to call to Lutheran congregations in any part of the world. While in school, the students resided in dormitories where they were closely supervised. Although each student listed his former home address on a registration card when asked for his "present address" (none being within the election district), and about two-thirds of the students were supported by their parents, the dean of the school testified that the students always considered the seminary as their home, and an election judge testified that he permitted them to vote after asking how long they had been at the seminary, all of them stating that they lived and made their home there. Upon enrolling at the seminary, the students in question knew only that they were abandoning their former residences, and that they would reside at the seminary, not permanently, but for an indefinite time, depending upon the promptness with which they might complete the course. The abandonment of the former residence was the important factor, it was held, and the necessity of ultimate removal from the seminary should not affect the result; actual residence, coupled with the intention to remain for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile[e].

\* \* \* \* \*

In *Berry v. Wilcox* (1895) 44 Neb. 82, 62 N.W. 249, the court laid down the rule that a student who goes to a university, emancipated from parental control, with no intention of returning to his former home, being uncertain as to his future residence after graduation, has a residence while at the university for the purpose of voting. In that case it was said: "The generally accepted definition of 'residence,' when the term is used with reference to the qualification of voters, is



synonymous with 'domicil[e],'—'that place . . . in which his habitation is fixed, without any present intention of removing therefrom.' The older cases and some of the modern ones require as an essential element the animus manendi, and construe this term as meaning an intention of always remaining." However, the court went on, this is not required when a student has no residence other than his college town, and here it was agreed that their education was the main purpose of the students in coming, and that they had no purpose formed as to their movements after graduation. 98 A.L.R.2d *Voting Residence—Student—Teacher*, 499.

The legislature recognized and authorized the establishment of a permanent residence in this state by one who has not yet reached age 21 but who will attain age 21 prior to the next election by providing for the registration of such persons prior to their 21st birthday, § 97.041, F. S., and, to that effect, waived disability of nonage of such persons for that purpose.

In the absence of any statutory or constitutional prohibition against students becoming permanent residents of the state, pursuant to § 97.041, F. S., the intention of such student or other minors similarly situated seeking registration would control. For example, one who, though a student, notes his plans as to future residence are uncertain and depend upon employment and other opportunities and who considers the county in which he seeks to register his home for the present and has no intention of returning to his parents' home, is eligible for registration. The same would apply as to one otherwise qualified, as noted above, who intends to make the county in which he attends school his permanent home.

A contrary result obtains where the student or other person intends a temporary sojourn in the county for the purpose of attending school or otherwise with the ultimate intention to return to parental residence.

Significantly, it matters not whether the prospective registrant is doctor, lawyer, student, teacher, bricklayer, truck driver, etc., insofar as his right to exercise his voting privilege is concerned. His occupation is of no concern to the supervisor of elections. Question 1 is answered accordingly.

#### AS TO QUESTION 2:

In my opinion, the Declaration of Domicile form prescribed by § 222.17, F. S., may not be used as positive proof of residence. If this were true, anyone by completing and filing said form could "prove" his residence. This, I feel, was not the legislative intent in enacting said statute. Therefore, question 2 is answered in the negative.

#### AS TO QUESTION 3:

There is no requirement in § 222.17, F. S., that a person seeking to file a Declaration of Domicile own any real property. Question 3 is, therefore, answered in the affirmative.

#### AS TO QUESTION 4:

Question 4 has been answered by question 1 insofar as your official responsibilities as supervisor of elections are concerned.

070-98—August 4, 1970

## REGULATION OF VOCATIONS

COSMETOLOGY—LICENSING REQUIREMENTS OF HAIR DYE  
MANUFACTURERS, THEIR AGENTS LICENSED AS  
COSMETOLOGIST IN STATES OTHER THAN FLORIDA

To: Eileen Carlton, Chairman, State Board of Cosmetology, Tallahassee

## QUESTION:

Is a manufacturer of hair dye products in violation of the Florida cosmetology law when such company trains its sales representatives, who are registered cosmetologists in other various states, by using a Florida registered master cosmetologist as an instructor and volunteer individuals for free demonstrations—the demonstrations being accomplished by the foreign registered cosmetologist under supervision of the Florida registered cosmetologist?

Attorney General's Opinion 058-227, July 22, 1958, Biennial Report of the Attorney General, 1957-1958, p. 770, in response to the question whether an agent of a manufacturer of hair coloring is subject to the license requirements of the Florida beauty culture law when teaching or demonstrating his product exclusively to Florida licensed beauticians?

stated:

Such demonstrations, if performed on the *public generally*, would subject the practitioner to the licensing requirements of the beauty culture law . . . .

As I stated in AGO 070-36 of this publication, dated April 29, 1970, it appears "beauty culture" is synonymous with "cosmetology" since the legislature in §12, Ch. 63-195, Laws of Florida, freely substituted the latter for the former where appearing in Ch. 477, F. S. Also, the present Florida cosmetology law, §477.03(1), F. S., provides, *inter alia*, that when any one of the practices contained in that section, e.g., tinting, coloring and dyeing hair, is done *without payment* for the *public generally* such activity constitutes the practice of cosmetology.

Pursuant to the foregoing, it appears that an individual demonstrating a manufacturer's cosmetic product directly on the public without having first qualified as a licensed cosmetologist in the state is in violation of Ch. 477, F. S. Accordingly, the employer of such persons would appear to be in violation of §§ 477.02(6) and 477.27(2), F. S.

A manufacturer or its employees not licensed under Ch. 477, F. S., are not subject to the administrative remedies provision of the statute. Nevertheless, a manufacturer and its employees are subject to the criminal and civil injunctive provisions of the chapter (§§ 477.27 and 477.28, F. S.).

Irrespective of possible violation of the Florida cosmetology law, legal proceeding should not be necessary if the board and manufacturer cooperate in getting the manufacturer licensed as a salon and its employees licensed as cosmetologists in this state.

A person licensed as a registered cosmetologist in another state which has a comparable cosmetology law can readily qualify as a registered cosmetologist in this state by paying a \$35 examination and registration fee and meeting the requirements for nonresident applicants as provided in § 477.12(2), F. S.

I point out the statutory provisions for dye manufacturers and their foreign registered cosmetologist employees to register in Florida inasmuch as the answer to your question is in the affirmative.

070-99—August 4, 1970

### TAXATION

#### TRADING STAMPS—RESALES, REDEMPTION OR COMBINATION— APPLICABLE LICENSING SECTION OF CH. 205, F. S.

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

#### QUESTIONS:

1. Since the passage of § 559.03, F. S., the mode of operation of redemption stores has changed to the extent that they will now redeem trading stamps for cash or products or redeem a combination of cash and stamps. Under the above-mentioned circumstances, are the redemption stores still subject to the license tax under § 205.401, F. S., or should a license be more properly issued under § 205.531, F. S.?

2. Individuals or companies (not redemption stores) buy or trade trading stamps for resale to other individuals, who in turn exchange the stamps for a product at a redemption store. Is this type of operation subject to an occupational license tax under the provisions of § 205.521, F. S., or any other section of Ch. 205, F. S.?

3. Food stores (super markets), in addition to giving away stamps with the purchase of food or other items, will also sell stamps outright to the public. Are food stores and other markets dealing in trading stamps in this manner subject to an occupational license tax under § 205.521, F. S., or any other section of Ch. 205, F. S.?

The answer to your first question is that stamp redemption centers are subject to occupational license taxes under § 205.401, F. S. Your first question must be answered in light of several existing Attorney Generals' opinions as well as Ch. 205, F. S. In AGO 052-207, July 2, 1952, Biennial Report of the Attorney General, 1951-1952, p. 320, it was said:

The business of dealing in trading stamps cannot be clearly ascertained in regard to its property classification. In only a few instances has any court attempted to so classify it. It is difficult to do so for the reason that it involves many transactions and the property involved changes its qualities as the stamp moves throughout the entire process. This situation has led a Federal Court to call these stamps "sui generis." That is to say, that such stamps are peculiar in their own right and that they constitute an exclusive classification of property.

Attorney General Ervin then came to the conclusion that the trading stamp companies were subject to tax under § 205.49, F. S., the predecessor to § 205.401, F. S.

Section 205.401, F. S., provides for the taxation of miscellaneous businesses not otherwise taxed and reads thusly:

Every person engaged in the operation of any business of such nature that no license can be properly required for it

under any other provision of this chapter or other law of the state, shall pay a license tax of \$150.00; provided, that no license shall be required for the growing or producing of agricultural and horticultural products.

However, AGO 052-297, rendered Oct. 27, 1952, Biennial Report of the Attorney General, 1951-1952, p. 321, contains the following language in regard to "premium stores":

We are inclined to view the so called premium stores, whether they confine the purchase of premiums exclusively with trading stamps or coupons or permit a partial use of such stamps and coupons with a cash payment, as being engaged in the business of selling tangible personal property and therefore within the purview and intent of § 205.59, F. S. . . . Whether or not the use or distribution of trading stamps and their redemption is to be classified as an incident to a business or as a separate business within itself is usually a question of fact to be determined in each particular case. We do not consider this opinion in conflict with our opinion of July 2, 1952 (052-207).

Furthermore, AGO 062-129, Oct. 2, 1962, Biennial Report of the Attorney General, 1961-1962, p. 572, states that only one license is necessary and should be issued for the primary business function of a concern. What is the primary function and what constitutes an incidental function is to be determined by the particular factual situation.

The passage of § 559.03, F. S., by the 1959 Legislature altered the nature of trading stamps. Stamps are now required to be printed with an indication that said stamps may be redeemed for cash, merchandise, or a combination of both. This serves further to complicate the question of whether stamp redemption centers deal in intangible or tangible property for licensing purposes.

Your letter does not set forth facts concerning the percentage of transactions of each type carried on by the stamp redemption centers. Considering the facts as stated, and the mixed nature of stamp redemption centers, it would be best to tax these concerns under the miscellaneous business provision, § 205.401, F. S.

In response to your second question, the companies or individuals referred to would come within the licensing provisions of § 205.521, F. S., which provides:

(1) Every person engaged in the business of trading, bartering, buying, lending or selling intangible personal property, whether as owner, agent, broker or otherwise, shall pay a license tax of \$37.50 for each place of business.

(2) No license shall be required under this section where the trading, bartering, buying, lending or selling is incidental to and a part of some other business classification on which an occupational license tax is imposed by this chapter, or other law of the state.

The situation envisioned by your second question seems to be one in which the company involved is only engaged in the sale of the stamps themselves with no association with their redemption or other aspects. The character of trading stamps was considered in the case of Sperry and Hutchinson Co. v. Hertzberg 1905, 69 N.J.E. 264, 60 A. 368 p.370, wherein the court said:

... The thing of value which the collector pays for and acquires and has the right to transfer is not the piece of paper and the ink thereon which constitute physically the trading



stamp, but the absolute property right which the stamp represents and evidences, which counsel for the complainant accurately refers to as a chose in action. This chose in action is created by the complainant, and put on the market for value, and made transferable from holder to holder by all the means by which such property may be transferred. . . .

The stamps as a chose in action fall into the realm of intangible personal property as defined by § 199.011, F. S., which provides:

*"Intangible personal property"* is hereby defined as all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents. *"Taxpayer"* shall mean a person, firm or corporation liable for taxes under this chapter for intangible personal property. (Emphasis supplied.)

It is important to pay heed to § 205.521(2), F. S., in determining the liability under that section. If the sale of stamps is incidental to another business, this section might not be applicable. On the facts as given, § 205.521, F. S., would govern.

Your third question presents a factual situation which does not call for taxation under § 205.521, F. S. The third situation presented by your letter calls for further consideration of the Attorney General Opinions previously cited. Attorney General Opinions 052-297 and 062-129, as mentioned above, both are clear in stating that an occupational license is necessary for the *primary* function of a business concern.

The facts as stated in your third inquiry seem to envision a normal supermarket operation. Assuming this to be true, the sale of trading stamps would be only incidental to the chief business operation, the sale of groceries and other household goods. This brings the supermarkets squarely within the purview of AGO's 052-297 and 062-129 and calls for licensing under either § 205.482, F. S., or § 205.531, F. S. In any case, unless the sale of trading stamps can be construed as the primary business of the particular supermarket, § 205.521, F. S., would be inapplicable.

070-100—August 4, 1970

#### ELECTORS AND ELECTIONS

##### QUALIFICATION FEES—VOLUSIA COUNTY CHARTER—REQUIREMENTS RELATIVE TO PAYMENT—DISPOSITION

To: Jess Mathas, Clerk, Circuit Court, DeLand

#### QUESTIONS:

1. What disposition should be made of qualifying fees required of candidates for county council of Volusia County, which county has a charter government?

2. What is the status of a person whose qualification papers have been accepted without payment of fee pending a federal court decision as to the validity of statute requiring payment of qualification fee which statute is held valid?

The answer to the first question requires an examination of appropriate provisions of the Volusia County Charter and applicable Florida statutes.

Perhaps the first provision of any import is Art. IX, § 901.1(2) of the Volusia Charter, Ch. 70-966, Laws of Florida, which provides:

"Except as otherwise provided by this charter, candidates for county officers shall qualify in accordance with the laws of Florida."

With this provision in mind, we must now turn to the Florida statutes to resolve any questions concerning qualifying fees. The first applicable statute is § 99.092, F. S., which provides that *any candidate for any office* is required to pay a filing fee in the amount of 3% of the annual salary of the office to the officer with which he qualified.

Section 99.061(3), F. S., directs candidates seeking a county office to file their papers and tender the filing fee to the clerk of the circuit court in the appropriate county. The statute goes farther and directs said clerk remit the amount of the filing fee to the secretary of the state executive committee of the political party to which the candidate belongs.

This clear legislative direction becomes lost in a quagmire when it is read in connection with Ch. 70-967, Laws of Florida, Art. IX, § 904, of the Volusia County Charter, which provides for a nonpartisan election: "Elections for all offices shall be on a nonpartisan basis. No candidate shall be required to pay any party assessment or be required to state the party of which they are a member . . ." (Emphasis supplied.)

This provision via, Ch. 70-966, Laws of Florida, Article IX, 901(2) of the Volusia Charter, would override the directional statute to the clerk (§ 99.061, F. S.) as it would be an impossibility to remit funds to the appropriate political party if the candidate is not required to state to which party he belongs.

Attorney General Opinion 062-12, Jan. 19, 1962, Biennial Report of the Attorney General, 1961-1962, p. 367, held that filing fees must be paid as a condition to becoming a candidate, as does *Taylor v. Gray*, 25 So.2d 492, (1946). This authority should dispel any contention that perhaps a filing fee is not required at all.

We are now faced with a situation wherein a filing fee has legitimately been imposed but the general intention of the legislature as to its disposition has been thwarted by specific legislation in the county charter.

Since the mandate of § 99.061, F. S., cannot be followed in this particular instance, perhaps the spirit of the law can be. When the political party receives this money in the usual case, it is expended for promoting the candidates and financing the political party. The end result is theoretically a better government for the people of Florida. In the instant situation the obvious way to accomplish this same purpose with these funds would be to remit them to the general revenue fund of Volusia County. The county could use the funds as it saw fit to promote better government in the county. Indeed, this solution finds support in past history of Florida. Under the 1951 election code, § 99.061, F. S., qualifying fees were payable to the clerk of the circuit court with no direction to him as to their disposition. Attorney General's Opinion 052-14, Jan. 21, 1952, Biennial Report of the Attorney General, 1951-1952, p. 126, directed said clerk to remit the funds to the county.

The remaining question to be answered concerns the status of a certain candidate. Since this candidate has refused to pay the qualifying fee, in light of *Taylor v. Gray*, and AGO 062-12, mentioned above, he should not be considered a candidate.

Without an opinion to the contrary by the courts of this state, I therefore believe that under the current county charter:

1. Qualification fees thus collected from candidates for county council should be turned over to the county.
2. A candidate who did not pay the qualifying fee within the statutory period should not have his name on the ballot.

070-101—August 5, 1970

## PUBLIC EMPLOYEES

COLLECTIVE BARGAINING—RIGHTS UNDER ART. I, § 6,  
STATE CONST.; § 839.221, F. S.*To: P. E. Kinsey, City Manager, Jacksonville Beach*

## QUESTION:

What are the responsibilities of a municipality under the provisions of the State Const. and laws of Florida with regard to recognition of, and collective bargaining with, a public employee union?

In reference to public employees, § 839.221 F. S., prohibits governmental employees—state, county and municipal—from participation in strikes or membership in organizations that assert the right to strike against the governmental employer. Subject to the above-cited limitation, the statute provides in subsection (2) thereof for "... the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization ... [and] the right to present proposals relative to salaries and other conditions of employment ..."

Prior to the revision of the State Const., the cases of *Dade County v. Amalgamated Association of Street Electric, Railway and Motor Coach Employees*, 157 So.2d 176 (3d Dist. Ct. App. 1963), Cert. Den. 379 U.S. 971 (1965), and *Longshoremen's Local 1526 v. Broward County Port Authority*, 183 So.2d 257 (4th Dist. Ct. App. 1966), would indicate that any attempt to compel the collective bargaining of issues relating to salaries and other conditions of public employment would be illegal.

At the present time, however, we are confronted with the new provision of the 1968 State Const. where it is stated in Art. I, § 6 of the Declaration of Rights:

**Right to Work**—The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Encompassed within the structure of this section is not only the bar to the right of public employees to strike, but also, inferentially, the grant of a right to bargain collectively on all matters to public as well as private employees.

The constitutional provision was judicially interpreted in the case of *Dade County CTA v. Ryan*, 225 So.2d 903 (Fla. 1969), wherein the Supreme Court, speaking through Chief Justice Ervin, held, "... with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by Section 6." The court further stated, in discussing the applicability of § 839.221, F. S., that:

Section 839.221 is the current legislative enactment setting forth standards and guidelines of said Section 6. ... [S]ection 839.221(2) deals directly with the right of collective bargaining of public employees; it appears to us to conform to the language of said Section 6.

In the sensitive area of labor relations between public

employees and public employer, it is requisite that the Legislature enact appropriate legislation setting out guidelines and otherwise regulate the subject within the limits of said Section 6. A delicate balance must be struck in order that there be no denial of the guaranteed right of public employees to bargain collectively with public employers without, however, in any way entrenching upon the prohibition against public employees striking either directly or indirectly or using coercive or intimidating tactics in the collective bargaining process.

We do not find that Section 839.221 is contrary to the said Section 6, or denies in any way the rights granted thereunder.

The direction was clearly indicated by the court as to what path the legislature should take in order to assist in implementing the provisions of the constitution and statutes in this delicate area of labor relations. The 1970 Legislature had before it many extensive pieces of legislation dealing with the issue of public employee collective bargaining rights, many of which successfully passed out of the house of representatives and the senate only to be subjected to the veto power of the governor.

At the present time there is pending litigation concerning this subject matter which may result in additional judicial guidance in the near future. We are continually mindful that the Supreme Court has mandated the legislature to create the necessary guidelines to implement the constitutional right of public employees, but those of us in the executive branch must be content with the law as it exists today, as any other action would be outside the scope of our constitutional power.

It is therefore apparent that under present law and its interpretation as indicated in the *Ryan* case by the Supreme Court, there can be little doubt that neither the state nor any of its political subdivisions may, subject to the restrictions in § 839.221, F. S., deprive public employees of their right of freedom of association, self-organization, or the right to join or to continue as members of any employee or labor organization, and such public employees shall have the right to bargain collectively with respect to the presentation of proposals relative to salaries and other conditions of employment through representatives of their own choosing.

However, in light of the *Ryan* case and the fact the governor has vetoed all legislative attempts to enact guidelines dealing with this subject matter, it would be inappropriate for this office to attempt to set forth any specific procedural guidelines with respect to the conduct to be employed by any state, county or municipal employer in implementing the collective bargaining process.

070-102—August 7, 1970

#### LAW ENFORCEMENT OFFICERS

#### SPECIAL DEPUTY SHERIFFS OR MARSHALS APPOINTED PURSUANT TO § 30.09(4)(c), F. S.—APPLICABILITY OF REQUIREMENTS OF § 23.069, F. S.

To: *Dana A. Mapes, Constable, St. Cloud*

#### QUESTIONS:

1. Are special deputy sheriffs or marshals appointed pursuant to § 30.09(4)(c), F. S., required to have the two hundred hours training specified by the Police Standards Act?



2. Are these special deputies liable by suit for damages for arrests made by them on real property owned by their employers if they do not hold the required two hundred hours certificate?

3. Is evidence seized pursuant to an arrest as contemplated above admissible in a court of law?

4. If they do not have the two hundred hour certificate, can the special deputies or their employers or the sheriff or the constable appointing such deputies, be sued?

Pursuant to § 30.09(4)(c), F. S., sheriffs are authorized to appoint special deputies "for watchmen or guard duties, when serving in such capacity at specified locations or areas only." A person appointed pursuant to this provision does not have to give bond or subscribe to an oath.

The powers and duties of constables are delineated in § 37.18, F. S. No provision for the appointment of deputy constables, special or otherwise, is included therein. Constables do not have the power to appoint deputies absent specific legislation to that effect. See AGO's 045-209, Aug. 1, 1945, Biennial Report of the Attorney General, 1945-1946, p. 147, 046-124, April 15, 1946, Biennial Report of the Attorney General, 1945-1946, p. 146, 051-278, Aug. 17, 1951, Biennial Report of the Attorney General, 1951-1952, p. 61.

Sheriffs and constables are major peace officers in Florida (29A Fla. Jur. Sheriffs, Constables and Police § 1), and since the powers and duties of these officers are similar to and partly coextensive with each other (29A. Fla. Jur. Sheriffs, Constables and Police § 62), your questions are considered in light of the status of special deputy sheriffs.

There is no doubt "the sheriff has the authority to appoint deputies for private concerns with the understanding that their salaries will be paid by such users, it being of course their sole duties, as such deputies, to protect the property of the private concerns." See AGO 042-374, Aug. 1, 1942, Biennial Report of the Attorney General, 1941-1942, p. 27. It is assumed, for the purposes of answering your first question, that the special deputies receive no pay or remuneration of any kind from the sheriff's office, this state, or any other political subdivision thereof; that the relation between the sheriff's office and the special deputies is merely a delegation of the authority to exert police power within the confines of their individual employer's property; that they will neither be called upon, nor allowed, to perform any of the ordinary functions of the sheriff's office, such as serving process and transferring prisoners; and that the appointment will not result in any indirect substitution of his services for those normally performed by a state employee or an employee of any political subdivision thereof. See AGO 060-100, May 20, 1960, Biennial Report of the Attorney General, 1959-1960, p. 601.

If a special deputy is appointed in contemplation of the above-mentioned assumption, he is not a "police officer" within the scope and intent of § 23.061(1), F. S., or an employee of the state or any political subdivision thereof, and the requirements of the Police Standards Act (Ch. 23, Part IV, F. S.) and the two hundred hours training requirement pursuant thereto are not applicable. Accordingly, your first question is answered in the negative.

Since the two hundred hours training requirement is not applicable to special deputy sheriffs or special deputy constables, it would have no effect upon the liability of the parties involved should litigation arise. This disposes of your second and fourth questions.

As to your third question, if the seizure of such evidence complies with federal constitutional requirements and does not violate any of the rules of evidence, such evidence would be admissible in a court of law.

070-103—August 11, 1970

## TAXATION

## LIMITATION OF MILLAGE, COUNTIES—LEVY FOR SPECIAL PURPOSE IN SPECIAL TAXING DISTRICT—§ 200.071(3), F. S.

To: E. S. MacKenzie, County Attorney, Brooksville

## QUESTION:

Is a special referendum required to be held before the levy of an ad valorem tax pursuant to Ch. 67-1453, Laws of Florida, creating the Hernando County special fire district, in the event the general county millage together with the millage levied for the special fire district exceeds ten mills?

The question is in my opinion answered in the negative by the provisions of § 200.071, F. S., formerly § 193.321, F. S., as amended by Ch. 70-368, Laws of Florida, adding subsection (3) below:

(1) Except as otherwise provided herein, no aggregate ad valorem tax millage shall be levied against real and tangible personal property by counties and districts as herein defined in excess of ten mills on the dollar of assessed value, except for special benefits and debt service on obligations issued in connection therewith . . .

\* \* \* \* \*

(3) In any county which, through a special taxing district covering a specific area of the county not within the boundaries of any municipality, provides services or facilities of the kind or type commonly provided by municipalities there may be levied, *in addition to the millages otherwise provided in this section*, against real and tangible personal property within each such special taxing district an additional ad valorem tax millage not in excess of ten mills on the dollar of assessed value to pay for such services or facilities provided through such special tax district. (Emphasis supplied.)

Although the levy authorized by Ch. 67-1453, Laws of Florida, appears to be an ad valorem tax for special purposes, as distinguished from a special benefits assessment which § 200.071, F. S., has been construed to exclude from its restraints (AGO's 069-22, 069-77, of this publication, 068-85, July 23, 1968, Biennial Report of the Attorney General, 1967-1968, p. 299), I believe the levy within the district in question is covered by the terms of subsection (3) above so that in addition to the aggregate millage provided in subsection (1), "there may be levied . . . an additional ad valorem tax millage . . . to pay for such services . . ." without resort to the provisions of § 200.091, F. S., permitting a levy above ten mills aggregate upon referendum approval.

Chapter 67-1453, Laws of Florida, creates the Hernando fire tax district encompassing "all property located in Township 22 South, Range 19 East, of Hernando County, excepting the incorporated limits of the city of Brooksville." Assuming that the special district created does not include any area within the boundaries of a municipality, it would appear to be within the terms of subsection (3), mentioned above, covering services of the kind commonly rendered by municipalities, which are provided "through a special taxing district covering a specific area of the county not within the boundaries of any municipality." Under this language the area of the county which may be covered by such district must of course be "specific," defined with

certainly, and must constitute a special district limited to unincorporated areas of the county and subject to the usual principles of law controlling special district operations.

Your question is, accordingly, answered in the negative under the terms of Ch. 70-368, Laws of Florida, which appears to be applicable to 1970 levies.

070-105—August 18, 1970

#### COUNTY OFFICIALS

#### COMPENSATION—SUPERVISOR OF ELECTIONS, BROWARD COUNTY—§ § 145.09 AND 145.121(2), F. S.; CHS. 70-429 AND 70-445, LAWS OF FLORIDA

To: *Elizabeth Athanasakos, Attorney, Supervisor of Elections, Fort Lauderdale*

#### QUESTIONS:

1. What compensation should have been paid to the supervisor of elections of Broward County for the period July 1, 1969, to July 1, 1970?

2. What is the amount of compensation to which the supervisor of elections is entitled for the period July 1, 1970, to Sept. 30, 1970, and what amount should be budgeted for the fiscal year Oct. 1, 1970, to Sept. 30, 1971?

You state that the total compensation for the previous supervisor of elections for the fiscal year ending Sept. 30, 1968, was \$15,715. It appears that of this amount, \$11,000 represented the salary provided by law for the office. (See Ch. 61-461, Laws of Florida, and § 145.09, F. S., 1967). Assuming that the additional income (\$4,715) represented *ex officio* personal income from fees and commissions earned by the supervisor during that fiscal year, then the total compensation of the supervisor for the fiscal year immediately preceding July 1, 1969, exceeded the salary (\$14,000) prescribed for the office by Ch. 69-346, Laws of Florida (§ 145.09, F. S., 1969). This being so, the salary of the supervisor of elections beginning July 1, 1969, is governed by § 145.121(2)(c), F. S., as amended by Ch. 70-445, Laws of Florida.

Section 145.121(2)(c), F. S., provides that those officials whose total compensation (salary plus *ex officio* personal income from fees, commissions and other compensation) was in excess of the salary payable under the act "shall continue to be compensated under the terms and conditions which prevailed immediately prior to July 1, 1969, until the expiration of their present term of office . . ." As I interpret this provision, it means that the official shall continue to receive his base salary as prescribed by Ch. 145, F. S., 1967, plus all the *ex officio* personal income from fees and commissions earned by him, during the remainder of his term of office—assuming, of course, that the base salary rate is not increased, either by law or by a population increase, to an amount in excess of the total compensation earned during the preceding fiscal year. This appears to be the legislative intent in view of the "whereases" in the preamble to Ch. 70-445, *supra*, which refer to the fact that under the 1969 act (§ 145.121, F. S., as amended by Ch. 69-346, Laws of Florida) the officials were limited to their salaries "thereby prohibiting them from retaining sums which had theretofore been paid to them as fees, commissions, and extra compensation" and state that it "would be unfair and unwise to reduce the compensation of an elected official after he has been elected during the balance of his term of office. . . ."

Under this formula, the compensation of the supervisor of elections of Broward County for the period July 1, 1969, to July 1, 1970, would be the salary authorized by law (\$11,000 per year) plus all *ex officio* personal income from fees and commissions earned by her during that period. See AGO's 069-136 and 069-137, of this publication.

However, if a portion of the \$4,715 represented reimbursement or payment for supplies for expenses not attributable to *ex officio* personal income from fees or commissions, then the total compensation of the supervisor for the fiscal year ending September 30, 1968, might be less than the \$14,000 salary payable under the 1969 salary raise provided by § 145.09, F. S., 1969. In this event, the provisions of § 145.121(2)(b), F. S., 1969 (it was amended in 1970 in respects referred to hereafter) are applicable, so that the compensation payable to the supervisor for the fiscal year ending Sept. 30, 1969, and for the period Oct. 1, 1969, to July 1, 1970, would be subject to the twenty percent implementation provision. See AGO 069-136, of this publication, for a detailed description of the formula to be used in computing this amount. Your first question is answered accordingly.

Answering your second question: Relevant here is another 1970 Act (Ch. 70-429, Laws of Florida) that increased the salaries of supervisors of elections in all population brackets, resulting in a raise in pay for the Broward County supervisor of elections to \$18,000. This act provides that it shall "take effect" on July 1, 1970. Assuming that her total compensation for the fiscal year ending Sept. 30, 1969, was less than the \$18,000 salary provided by Ch. 70-429, Laws of Florida, the supervisor in question will now come within § 145.121(2)(b), F. S.,—that is, one whose total compensation during the preceding fiscal year, including fees and commissions, was less than the salary provided by Ch. 145, F. S.

Ordinarily, under § 145.121(2)(b), F. S., the increase in salary provided by Ch. 145, F. S., would be "implemented" at the rate of twenty percent per year of the total compensation for the preceding year until the prescribed salary is reached. However, the 1970 legislature amended § 145.121(2)(b) to expressly exclude supervisors of elections (school board members were already excluded under the 1969 Act) from the implementation schedule by providing that these officials "...shall have their salary adjusted to the amount provided in §§ 145.041 and 145.09, respectively, and shall not be subject to the twenty percent limitation unless otherwise specified by special or local law."

I have found no special or local law (nor a general law of local application) applicable to the Broward County supervisor of elections that supersedes the above-quoted provision of § 145.121(2)(b), F. S. It follows, therefore, that the supervisor of elections of Broward County is entitled to compensation from and after July 1, 1970, on the basis of an annual salary of \$18,000 per year, and that this amount should be budgeted for her salary for the fiscal year Oct. 1, 1970 to Sept. 30, 1971.

070-106—August 18, 1970

#### COUNTY OFFICIALS

#### SUPERVISOR OF ELECTIONS, HOLMES COUNTY— SALARY FOR FISCAL YEAR OCTOBER 1, 1970 TO SEPTEMBER 30, 1971

To: Jack Faircloth, Clerk, Circuit Court, Bonifay



## QUESTION:

What amount should be budgeted for the salary of the supervisor of elections of Holmes County for the fiscal year Oct. 1, 1970, to Sept. 30, 1971?

It appears that Ch. 70-429, Laws of Florida, amended § 145.09, F. S., so as to increase the salary of the supervisor of elections of Holmes County to \$8,000, and provided that the act should "take effect" on July 1, 1970. This increase in salary is subject to the provisions of § 145.121(2)(b), F. S. (as amended by Ch. 70-445, Laws of Florida) as follows:

... School board members and supervisors of elections whose total compensation was less than the salary payable under this chapter ... shall have their salary adjusted to the amount provided in §§ 145.041 and 145.09, respectively, and shall not be subject to the twenty percent limitation unless otherwise specified by special or local law. (Emphasis supplied.)

I find no special or local law (or general law of local application) relating to the supervisor of elections of Holmes County. Accordingly, the salary of the supervisor of elections of Holmes County should be adjusted so as to budget the full amount (\$8,000) for the fiscal year 1970-1971, and should also be adjusted for the fourth quarter of the fiscal year ending September 30, 1970, in accordance with the increased rate of pay provided by Ch. 70-429, Laws of Florida.

070-107- August 19, 1970

## CLERKS OF CIRCUIT COURT

SERVICE CHARGES, MINUTE BOOK ENTRIES AND CERTIFICATION OF DOCUMENTS—§ § 28.21 AND 28.24, F. S.;  
CH. 70-134, LAWS OF FLORIDA

To: D. T. Farabee, Clerk, Circuit Court, Fort Myers

## QUESTIONS:

1. Is the service charge of \$4.00 per page for "court minutes" prescribed by § 28.24(2), F. S., as amended by Ch. 70-134, Laws of Florida, applicable to the entry in the court minutes of such matters as
  - a. The arraignment, sentence and judgment of the defendant, and
  - b. An order of probation and revocation of probation?
2. What charges may the clerk make for entries in the court minutes?
3. Does § 28.24(3), F. S., relating to "transcripts of record in appellate or other proceedings" apply to a document on file or recorded in the clerk's office?
4. What charges may the clerk make for certifying a two-page instrument prepared by someone other than the clerk?

Under § 28.21(1), F. S., it is the duty of the circuit court clerk to keep minute books "in which he shall keep regular and fair minutes of all the proceedings of the circuit court, and of the judge, in term, which shall be signed by the judge before the adjournment of each term." All orders, judgments, and decrees of the court must be entered or recorded in the minutes of the court (in the Chancery Order Book, when sitting

in equity) since "a court of general jurisdiction speaks through its records, and . . . until the judgment, order or decree is entered of record there is no competent evidence of its rendition." *Magnant v. Peacock*, Fla. 1945, 24 So.2d 314. When entered by the clerk, he "acts for and as the amanuensis of the judge." *McGee v. Ancrum*, Fla. 1894, 15 So. 231, 233. Accord: *Winn & Lovett Grocery Co. v. Luke*, Fla. 1946, 24 So.2d 310, 313.

In criminal cases, "the journal or minutes of the court . . . should contain, in addition to the verdict and sentence, language of some sort, showing an adjudication by the court of the defendant's guilt, as one of the essential elements of an effective judgment of conviction." *Ellis v. State*, Fla. 1930, 129 So. 106, 110. This decision also points out other matters that should be noted in the minutes of the court in connection with the entry of the judgment of conviction, such as the calling of the case for trial, the appearance of the parties, the plea of the defendant, and if "not guilty" the selection, impaneling, and swearing of the jury, the submission of the evidence, the charge of the court, the return of the verdict, and the finding of the jury. If an order of probation is entered—either before or after judgment or sentencing, as authorized by § 948.01, F. S.—this, too, should be entered in the minutes, as should the revocation of such order. Your first question is, therefore, answered in the affirmative.

The charge to be made by the clerk for "court minutes" is \$4.00 per page, not \$4.00 per entry. Presumably, some or all of the matters referred to above could be entered on one page.

Your second question is answered accordingly.

Answering your third and fourth questions: Section 28.24(3), F. S., specifies a charge of \$1.00 per page for verifying and certifying "transcripts of record in appellate or other proceedings, prepared by attorney for appellant or someone else other than clerk . . ." Under the maxim *eiusdem generis*, this fee would clearly apply to transcripts of record in court proceedings and not to documents such as mortgages, deeds, and the like that are presented for recordation, and a copy of which is merely certified by the clerk. The charge for this is provided by § 28.24(5), F. S., namely, "for certifying copies of any instrument in the public records \$1.00." Thus, the charge for certifying a two-page instrument such as a deed or mortgage would be \$1.00. Your third and fourth questions are answered accordingly.

070-108—August 19, 1970

#### COURT REGISTRY FUNDS

#### DEPOSIT AND INVESTMENT BY CLERKS OF CIRCUIT COURT—§ 43.17(2), F. S., AS CREATED BY CH. 70-31, LAWS OF FLORIDA

To: John B. Dunkle, Clerk, Circuit Court, West Palm Beach

#### QUESTIONS:

1. Does a circuit court clerk have the authority under Ch. 70-31 or Ch. 70-47, Laws of Florida, to invest court registry funds in certificates of deposit or treasury bills or notes?
2. Does Ch. 70-31, Laws of Florida, supersede a stipulation of the parties and an order of the court directing the clerk to invest court registry funds in certain securities?

Section 43.17, F. S. (enacted as Ch. 15996, Laws of Florida, 1933, and formerly appearing as § 54.04, F. S.), requires the circuit court

clerks to deposit court registry funds with the state treasurer or in a state depository (with an exception noted hereafter). Chapter 70-31, Laws of Florida, purports to amend §43.17 by adding an additional subsection (2) providing that such funds, if held longer than thirty days, shall be deposited by the clerk in an "interest-bearing account," but with this important proviso: "provided, however, that such deposited funds must be fully available for withdrawal on demand." (Ch. 70-47, Laws of Florida (§215.47, F. S.), relates to the investment of state funds by the board of administration and does not apply to either the investment or the deposit of court registry funds by circuit court clerks.)

The above-quoted proviso of Ch. 70-31, Laws of Florida (§43.17, F. S.), has the effect of frustrating the legislative intent insofar as the deposit of court registry funds in interest-bearing accounts is concerned, for these reasons: Through their membership in the federal reserve system or the federal deposit insurance corporation, almost all the banks of this state are subject to the federal reserve act and the rules and regulations promulgated thereunder by the board of governors of the federal reserve system. Under the federal act and regulation Q, the banks are prohibited from paying any interest on demand deposits. While a "savings deposit" is a type of savings account which may be payable on demand, regulation Q defines "savings deposit" in such a manner as to prohibit the banks from accepting this type of deposit from corporations for profit and from governmental entities (except school districts). In short, the state, counties, municipalities and other governmental agencies of this state (except school districts) are limited to "time deposits" insofar as interest-bearing accounts are concerned under present federal regulations.

A certificate of deposit is an interest-bearing "time deposit" from which funds may be withdrawn "in an emergency where it is necessary to prevent great hardship to the depositor," provided the approval of an official of the bank for such withdrawal is obtained. Section 217.4, Regulation Q, *supra*. But Ch. 70-31, Laws of Florida (§43.17, F. S.), requires that the interest-bearing account "must be *fully available* for withdrawal on demand" (Emphasis supplied.) so that there is considerable doubt that a certificate of deposit would qualify as an interest-bearing demand account.

In sum, Ch. 70-31, Laws of Florida (§43.17, F. S.), purports to require circuit court clerks to deposit court registry funds, if held more than thirty days, in an interest-bearing demand account; but the federal law and regulations promulgated thereunder prohibit the banks of this state from accepting such deposits. In view of this stalemate, it must be concluded that so long as the federal regulations referred to above are in effect, Ch. 70-31, Laws of Florida (§43.17, F. S.), is ineffectual to authorize or require the circuit court clerks to deposit court registry funds in interest-bearing demand accounts.

This does not mean, however, that the clerks may not deposit or invest court registry funds in certificates of deposit or treasury bills or notes, provided the parties agree upon such deposit or investment and it is approved by the court. As noted in AGO 059-264, Dec. 14, 1959, Biennial Report of the Attorney General, 1959-1960, p. 417, court registry funds "could logically be classified as funds held in trust for parties before the court and [are] maintained in a different capacity than other moneys deposited by the clerk or the treasurer in the same bank."

In view of the present ineffectiveness or dormancy of Ch. 70-31, Laws of Florida (§43.17, F. S.), and in the absence of any other statute purporting to limit or direct the deposit or investment of court registry

funds, it would seem that the parties, with the court's approval, could authorize and require the circuit court clerk to deposit or invest the funds in certificates of deposit or treasury bills to await the outcome of their litigation.

Your first question is answered accordingly.

From what has been said in answer to your first question, it is clear that your second question should be answered in the negative.

070-109—August 19, 1970

#### BUREAU OF VITAL STATISTICS

#### CHARGE BY LOCAL REGISTRAR FOR ISSUANCE OF BURIAL-TRANSIT PERMITS UNAUTHORIZED

To: *Robbie E. Weaver, Executive Secretary, State Board of Funeral Directors and Embalmers, Jacksonville*

#### QUESTION:

Is a local registrar of vital statistics permitted to make a charge for issuance of a burial-transit permit, without which a dead human body cannot be buried or transported, by operation of § 382.061, F. S., where there is no express authority permitting the imposition of such charge?

Meticulous examination of Ch. 382, F. S., fails to reveal provisions which authorize a local registrar to assess and collect a fee in connection with issuing burial-transit permits pursuant to § 382.061, F. S.

Local registrars are appointed by the state registrar of vital statistics in each registration district of the state for a period of four years. It is the responsibility of the local registrar, among other things, to issue burial-transit permits. (§ § 382.04, 382.33, F. S.)

Certain fees are authorized the state registrar for performing designated functions in connection with public records in the custody of the state registrar. (§ 382.35, F. S.)

The local registrar is paid .25 for each birth certificate and still-birth certificate properly and completely made out and registered with him and correctly reported and promptly returned by him to the state registrar as required. (§ 382.34, F. S.)

It does not appear the fees authorized the state registrar are intended as fees of the local registrar.

Fees collected by officers represent the charge which the state makes for services rendered by it through its officers, and constitutes a fund subject to the control of the state and to be applied as the legislature directs. *State v. Spencer* 1921, 87 So. 634, 81 Fla. 211. When not otherwise provided in the State Constitution, duties and compensation of officers performing executive and administrative governmental functions shall be fixed by law. Art. III, § 27, State Const.; *Dade County v. State* 1928, 116 So. 72, 95 Fla. 465, followed in *City of Miami Beach, Fla., v. State* 1928, 116 So. 480, 95 Fla. 691.

"Fee" is charge fixed by law for service of public officer or for use of privilege under government's control. *Flood v. State* 1928, 117 So. 385, 95 Fla. 1003. The duties of a public officer may be exacted without specific compensation. *State ex rel. May v. Fussell* 1946, 24 So.2d 804, 157 Fla. 55.

Public officers have no legal claim for official services rendered except when, and to extent that, compensation is provided by law, and when no compensation is so provided rendition of such services is deemed to be gratuitous. *Gavagan v. Marshall* 1948, 33 So.2d 862, 160 Fla. 154.



It should also be noted that fee statutes are to be strictly construed. F.S.A. § 321.05; *Bradford v. Stoutamire* 1948, 38 So.2d 684.

In view of the above statutory provisions and authority, the question presented is answered in the negative.

070-110—August 20, 1970

#### TAXATION

##### AD VALOREM RETURNS ON PERSONAL PROPERTY— PENALTIES FOR IMPROPER OR LATE FILINGS, REDUCTION OR WAIVER—CONSTRUCTION OF § 193.072, F. S.

To: *Gaylord A. Wood, Jr., General Counsel, Broward County Tax Assessor, Fort Lauderdale*

#### QUESTION:

Under what circumstances may the county tax assessor reduce or waive the penalties prescribed by § 193.072, F. S., 1970, for failure to file improper or late ad valorem tax returns?

Attorney General Opinion 070-14, this publication concludes that "The provisions of § 199.321, F. S., are mandatory in nature. The penalty must be applied and the only question which remains is what event warrants penalization."

Effective January 1, 1971, however, Ch. 70-243, Laws of Florida, repeals § 199.321, F. S., and by § 13 provides in new § 193.072, F. S., revised penalties applicable to all ad valorem tax returns, stating in subsection (4): "For good cause shown, and upon finding that such unlisting or late filing of returns was not intentional or made with the intent to evade or illegally avoid the payment of lawful taxes, the tax assessor may reduce or waive any of said penalties."

070-111—August 20, 1970

#### REGULATION OF PROFESSIONS

##### PRACTICE OF DENTISTRY—PRACTICE WHILE LICENSE SUSPENDED—FELONY

To: *John W. Tanner, Assistant State Attorney, Holly Hill*

#### QUESTION:

Do the penalty provisions of § 466.42, F. S., (which makes the practice of dentistry without having first obtained and had recorded a license certificate from the board of dentistry a felony), pertain to the situation where a lawfully licensed dentist continues to practice dentistry after his license is lawfully suspended by the state board of dentistry?

Section 466.42, F. S., in part states:

Any person who shall practice dentistry or dental hygiene in this state within the meaning of this chapter without having first obtained and had recorded a license certificate from the board, shall be guilty of a felony and subject to imprisonment for not more than 2 years and a fine of not more than \$1,000.00.

I further call your attention to § 466.02, F. S., which states:

It shall be unlawful for any person to practice dentistry or dental hygiene in the state, except:

(1) Those who are now duly licensed and registered dentists, pursuant to law;

(2) Those who are now duly licensed and registered dental hygienists, pursuant to law;

(3) Those who may hereafter be duly licensed and registered as dentists or dental hygienists, pursuant to the provisions of this chapter.

Under the provisions of the above-cited section, it would appear that a person must be duly licensed in order to be eligible to practice dentistry in this state. It would further appear that any lawful suspension of the license of a practitioner for whatever period contemplated by order of the board of dentistry would have the effect of depriving the practitioner of his license to practice his profession for the period of such suspension.

Thus, although the practitioner may meet the necessary qualifications prerequisite to being duly licensed and registered, such certificate and recording as contemplated by § 466.42, F. S., will remain current only as long as the practitioner remains duly licensed. At such time as his license is either revoked, suspended or not renewed, the practitioner, of necessity, must be deemed to be without a duly recorded license certificate.

Therefore, contrary to the phraseology of your question, it is my opinion that if the license of a dentist is lawfully suspended, the practitioner may not be considered lawfully licensed during the period of his suspension. It would thus follow that any action on the part of a formerly licensed practitioner constituting the practice of dentistry would violate the provisions of § 466.42, F. S.

070-112—August 24, 1970

#### GAME AND FRESH WATER FISH COMMISSION

#### ALLIGATOR PRODUCTS—DEFINITION OF TERM

#### "ALLIGATOR"—CONSTRUCTION OF

§ 372.6645, F. S.

To: *O. E. Frye, Jr., Director, Game and Fresh Water Fish Commission, Tallahassee*

#### QUESTION:

Is the sale of products made from caiman or crocodile skins prohibited by § 372.6645, F. S.?

In statutory construction the duty is to ascertain and give effect to the intent expressed by the legislature in the statute being construed. *Scarborough v. Newsome* 1942, Fla., 7 So.2d 321: "The Supreme Court in construing a statute, will consider its history, evil to be corrected, law-making body's intention, subject regulated, and object to be obtained."

At the outset, before attempting to answer your question, it is noted that the intention expressed in the title of Ch. 70-3, Laws of Florida, is to enact a law "prohibiting the sale or offering for sale of alligator products." The preliminary statements clearly indicate that the reason for prohibiting the sale of "alligator products" is to take away the profit heretofore derived from taking the skins of alligators and in so doing conserve alligators. In § 372.6645(2)(a), F. S., it is provided that "alligator" means "any reptile commonly known or classified as an

alligator, crocodile or caiman" and subsection (2)(b) defines "alligator products" to mean and to include "products made from any part of an alligator hide."

Section 372.6645(3), F. S., provides that "Alligator products shall not be sold or offered for sale in this state." Section 372.6645(4), F. S., makes possession of all alligator products, as defined, prima facie evidence of the fact of possession for sale or for offer for sale of said products contrary to subsection (3) above quoted. This means that anyone apprehended on a charge of being in possession of such products will be allowed to explain that his possession of such is lawful—that is, that the establishment of a prima facie case against the possessor does not take away his presumption of innocence, but only places on him the duty to explain that his possession is lawful. In *McNair v. State* 1911, Fla., 55 So. 401 it was said:

... in a criminal case the establishment of a prima facie case does not take away from the defendant the presumption of innocence, but leaves that presumption to operate, in connection with, or in aid of, any proofs offered by him, or arising out of the evidence to rebut or impair the prima facie case made out by the state. A circumstance aided by that presumption may so far rebut or impair the prima facie case as to render a conviction upon it improper. . . .

It is legally permissible for the legislature to create such a presumption when there is a rational connection between the fact presumed and the ultimate fact. In the case of *United States v. Gainey* 1965, 380 U.S. 63, 13 L.Ed. 2d 658, 85 Sup. Ct. 754, the statute involved made the unexplained presence of an individual at the site of an illegal distillery sufficient evidence to authorize conviction:

The process of making the determination of rationality is by its nature highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

The conclusion is that the legislature has determined that the prohibition of products from caiman and crocodile skins is a necessary step in making effective the prohibition of products made of bona fide alligator skins. Therefore, you are advised it is unlawful to sell or offer for sale in Florida products made from alligator, caiman or crocodile skins and that possession of such products is prima facie evidence that the same are being held for sale contrary to the provisions of § 372.6645, F. S.

070-113—August 24, 1970

#### JUVENILES

#### JUVENILE OFFENSE REPORTS—CONFIDENTIALITY

To: Joe H. Mount, Attorney, City of Tampa

#### QUESTION:

Should records of arrest of children made by the Tampa police department be treated as confidential or as public records subject to inspection by the public?

It is my considered opinion that such records are confidential and should not be subject to public inspection.

It is true that the legislature by passage of Ch. 69-113, Laws of Florida, failed to reenact the separate record requirement formerly found in § 39.03(6), F. S. But I do not equate the failure of the legislature to reenact the separate record requirement with the intent that arrest records of children are to be subject to public disclosure. Section 39.03, F. S., sets up elaborate precautions for the keeping of juvenile photographs and fingerprints confidential. To say, then, that the absence of the separate record requirement means that the Tampa police department may make public disclosure of juvenile offense reports is inimical to the expressed legislative intent.

Section 39.02(1)(a), F. S., grants exclusive, original jurisdiction of dependent and delinquent children to the juvenile court. This jurisdiction attaches when a child is taken into custody. See § 39.06(6), F. S. The provisions of § 39.03(3), F. S., require that any person taking a child into custody shall,

... without delay for the purpose of investigation or any other purpose, deliver the child, by the most direct practicable route, to the court of the county or district where the child is taken into custody ... and shall at the earliest practicable time report in writing to the court the facts by reason of which the child was taken into custody.

It can hardly be doubted that the report made to the court by the person taking a child into custody becomes a juvenile court record. Such records except those of traffic violations are not open to inspection by the public. Section 39.12(3), F. S.

Any alleged conflict between the position taken and the provisions of § 119.07, F. S., is more illusory than real. First, § 119.07(1), F. S., has reference to public records. However, § 119.07(2)(a), F. S., reads as follows:

All public records which presently are deemed by law to be confidential or which are prohibited from being inspected by the public, whether provided by general or special acts of the legislature or which may hereafter be so provided, shall be exempt from the provisions of this section.

When an offense report containing the details of an offense alleged to have been committed by a child is turned over to the juvenile court, it is a juvenile court record and not subject to public inspection. The copy of the child's offense report retained in the records of the Tampa police department is a copy of a confidential juvenile court record and similarly not subject to public inspection. It is a record deemed by law to be confidential and falls squarely within the purview of § 119.07(2)(a), F. S., above quoted.

Accordingly, it is my opinion that the Tampa police department should treat a juvenile offense report as being confidential and refuse to allow public inspection thereof except upon order of the juvenile judge.

070-114—August 25, 1970

#### MUNICIPAL ZONING

#### CHANGE IN CLASSIFICATION—TIME FOR FILING PROTEST—UNINCORPORATED AREAS

To: J. H. Chumbley, City Attorney, City of Pinellas Park, St. Petersburg



## QUESTIONS:

1. Must a protest of 20% of the adjoining property owners be filed at the time of the public hearing before the city commission in order to be timely filed?

2. When property within 500 feet of the property to be rezoned lies outside the city limits, must the owners be notified of the proposed rezoning?

3. Are such owners to be included in computing the 20% of property owners who may protest the rezoning?

The zoning ordinances of the City of Pinellas Park (Articles I through XVI, Appendix A, Code of Ordinances) follow the general plan prescribed by Ch. 176, F. S. Section 176.06, F. S., and § 3, Art. XIV of the Code of Ordinances both provide that a vote of three fourths of the members of the governing body is required for a zoning change that is protested by 20 percent of the property owners in the area to be rezoned or 20 percent of those within 500 feet of such area.

The action that is compelled by the objection of 20 percent of the adjoining property owners is that of the governing body itself in amending the zoning ordinance, and not that of the planning and zoning commission—an advisory body—in making its recommendation; and the “public hearing” that is essential to the validity of an amendment to the zoning ordinance is that held by the governing body, not the hearing before the advisory commission. See *Town of Hillsboro Beach v. Weaver*, Fla. 1955, 77 So.2d 463; *City of Miami Beach v. State*, Fla. App. 1959, 108 So.2d 614, 619. I have the view, therefore, that the written protest of 20 percent of the property owners should be filed at the time of the scheduled meeting of the governing body of the city at which the proposed zoning change is to be considered, in order to activate the provision in question.

Your first question is answered in the affirmative.

Answering your second and third questions, neither the statute nor the ordinance limits the adjoining property owners who are entitled to object to rezoning to those within the corporate limits of the municipality. No Florida decisions on this matter appear to have been rendered, so that there are no guideposts in this area of our jurisprudence that we may follow. However, in the absence thereof, and until the Florida courts rule to the contrary, I might commend to you the decisions of courts of other jurisdictions that seem to have adopted a logical and reasonable view, namely, that proximity is the controlling factor, not location within or without the city limits. See *Koppel v. City of Fairway*, Kas. 1962, 371 P.2d 113; *Borough v. Cresskill*, N.J. 1954, 104 A.2d 441, affirming 100 A.2d 182. In the New Jersey case the court said that the “outsiders” residing in adjoining areas who might be adversely affected by a zoning change are entitled to be heard and to be given the same consideration as the property owners within the municipality, and that reasonable consideration should be given to the character of the adjoining land, even though it happened to be outside the corporate limits of the city adopting the zoning amendment.

It would seem, therefore, that in the interest of community tranquility and the public health, safety and welfare generally—both within and without the city—the city should notify the owners within 500 feet of the property to be rezoned, as required by § 1(c) of Article XIV, Code of Ordinances of Pinellas Park, without regard to whether or not they are actually within the city limits, and should also include such owners in computing the 20% of property owners who may protest the rezoning.

070-116—August 26, 1970

ELECTORS AND ELECTIONS  
CANDIDATES—CAMPAIGN CONTRIBUTIONS—  
APPLICATION OF CH. 70-267, LAWS  
OF FLORIDA, AMENDING § 99.161(1),  
(2)(a), (6), F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Should contributions made prior to July 1, 1970, the effective date of Ch. 70-267, Laws of Florida, amending § 99.161(1), (2)(a), (6), F. S., be included as counting toward the ceiling established by said Ch. 70-267, Laws of Florida?

It is my opinion that contributions made prior to July 1, 1970, the effective date of the act, should not be governed by the provisions of Ch. 70-267, Laws of Florida, and, therefore, should not be counted toward the ceiling established by that law. First, to hold that such contributions come under the limits of Ch. 70-267 would be to construe the act as operating retrospectively. It is among the oldest maxims of the law that a statute is deemed to operate prospectively only unless an intent that it operate retrospectively is clearly expressed. *State ex rel. Riverside Bank v. Green* 1958, 101 So.2d 805, 30 Fla.Jur. *Statutes*, § 141. As a matter of fact, the opposite intent is shown by language of § 2 of Chapter 70-267. The language of that section makes clear that expenditures actually made prior to the effective date of the act would not come under its provisions. There is no expressed intent pointing to the opposite conclusion for contributions. Indeed, such a retrospective operation of the act as to contributions would render meaningless the opposing language with regard to expenditures since the act prohibits expenditures in excess of contributions collected.

In summary, it is my conclusion that no political contributions made prior to July 1, 1970, under the wording of Ch. 70-267, should be counted toward the limitations established under that act.

070-117—August 27, 1970

ELECTORS AND ELECTIONS  
BALLOTS—PROPER DESIGNATION FOR THE  
OFFICE OF STATE TREASURER

To: William M. Gillespie, State Representative, New Smyrna Beach

QUESTION:

Is the proper designation on the primary and general election ballots for the 1970 election for the office of "treasurer" or for the office of "insurance commissioner and treasurer"?

In order to properly answer your question, a short history on the office of the treasurer and his duties as insurance commissioner is necessary.

In the State Constitutions of 1838, 1861 and 1865, the treasurer was designated as "state treasurer." By the State Constitutions of 1838 and 1861 he was to be elected by joint vote of both houses of the general assembly. The 1865 State Constitution required that he be elected by the electors of the state. In the State Constitution of 1868 there was first mention of a cabinet, which cabinet contained a treasurer who was to be appointed by the governor.

The State Constitution of 1885, Art. IV, § 20, provides for a treasurer to be elected by the qualified electors of the State. Article IV, § 24 provides as follows:

The Treasurer shall receive and keep all funds, bonds, and other securities, in such manner as may be prescribed by law, and shall disburse no funds, nor issue bonds, or other securities, except upon the order of the Comptroller, countersigned by the Governor, in such manner as shall be prescribed by law.

It should be noted that the foregoing quoted section does not contain the phrase "and perform such other duties as may be prescribed by law," as was common to the other constitutionally designated officers.

In *Whitaker v. Parson*, 86 So. 247 (1920), the question was raised as to whether the legislature could prescribe duties to be performed by the treasurer other than those expressly provided for in the State Constitution of 1885. In holding that the legislature could provide additional duties for the state treasurer and other officers the court said: "This does not create new offices for the three state officials. It adds new administrative duties to existing administrative offices. . . ."

The first regulation of insurance companies in Florida appears to be Ch. 1863, Laws of Florida, 1872, by which the legislature created a board of insurance commissioners, composed of the state treasurer, comptroller, and attorney general, with the state treasurer having principal authority to regulate and license said insurance companies. These provisions were carried forward by Ch. 4380, Laws of Florida, 1895.

Chapter 6847, Laws of Florida, 1915, provided in pertinent part: "The State Treasurer is hereby designated Insurance Commissioner. . . ." This Act also abolished the board of insurance commissioners. Chapter 7871, Laws of Florida, 1919, carried forward the above-quoted provision of Ch. 6847, Laws of Florida, 1915.

Section 1, Ch. 24086, Laws of Florida, 1947, provided in pertinent part: "The term 'Commissioner' when used in this Act shall mean the Treasurer of the State of Florida as ex officio Insurance Commissioner". This provision was carried forward by Ch. 25406, Laws of Florida, 1949, and Ch. 28075, Laws of Florida, 1953. Chapter 29856, Laws of Florida, 1955, provided: "The state treasurer is designated insurance commissioner. . . ." Chapter 59-205, Laws of Florida, the last Act passed by the legislature on this point prior to Ch. 69-106, Laws of Florida, provided: "'Commissioner' means the state treasurer as ex officio insurance commissioner of this state."

From the foregoing, it is apparent that the constitutional office of the treasurer had, as did other constitutional offices, other administrative duties assigned to it, which duties could be, and from time to time were, changed by the legislature. Against this near-century of administration of the insurance laws by the state treasurer, we then examine the State Constitution of 1968 and the Governmental Reorganization Act passed by the 1969 Legislature as directed by the new Constitution.

Article IV, § 4 of the State Const. of 1968 provides in part:

(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.

\* \* \* \* \*

(e) The treasurer shall keep all state funds and securities.

He shall disburse state funds only upon the order of the comptroller, countersigned by the governor. The governor shall countersign as a ministerial duty subject to original mandamus.

The provisions of subsection (e) of § 4 above-quoted is a substantial change from Article IV, § 24 of the 1885 State Const. and as yet there has not been any decision construing same, as it relates to keeping and administering of all state moneys.

Article IV, § 6, State Const., 1968, provides in pertinent part:

All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. *The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor. . . .* (Emphasis supplied.)

As pointed out in your letter, § 13 of Ch. 69-106, Laws of Florida (§ 20.13, F. S.), provides as follows:

(1) The head of the department of insurance is the treasurer who shall hereafter be named the "insurance commissioner and treasurer".

(2) *The powers, duties and functions of the treasurer, the office of the treasurer, insurance commissioner and state fire marshal prescribed by law, except those required by the constitution to be performed by the treasurer directly, are assigned by a type three (3) transfer to the department of insurance.* (Emphasis supplied.)

A type three transfer is provided in § 6(3), Ch. 69-106, Laws of Florida (§ 20.06(3), F. S.) in part as follows:

A type three (3) transfer is the merging into a department of an existing agency or if elsewhere in this act certain identifiable programs, activities or functions have been removed from an existing agency, it is the merging into a department of the existing agency with the certain identifiable programs, activities or functions removed therefrom. . . .

Section 35 of Ch. 69-106, Laws of Florida (§ 20.33, F. S.) provides:

All statutory law which names units of organization in the various agencies of the executive branch in a manner in conflict with the nomenclature used herein are amended so as to be consistent with the nomenclature used in this act. If any agency, program, activity or function transferred herein is changed in name or substance by another act of the legislature during the 1969 session, the agency, program, activity or function, as amended, is transferred in a manner consistent with the intent expressed by this act.

The foregoing provisions of §§ 13 and 35, Ch. 69-106, Laws of Florida (§ § 20.13 and 20.33, F. S.), would not appear to amend Ch. 18, F. S. and other statutes, which set forth the duties of the constitutional office of the treasurer but would only amend Chs. 624-632, F. S., commonly known as the insurance code.

Section 13, Ch. 69-106, Laws of Florida (§ 20.13, F. S.), only establishes the department of insurance not the office of treasurer which is established by Art. IV, § 4 of the State Const.

Similarly, § § 13 and 35, Ch. 69-106, Laws of Florida (§ § 20.13 and



20.33, F. S.), would not amend the election code, as the officer being elected is the constitutional officer, not the head of a legislatively established department which could be abolished or transferred to the supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or established as an independent board by any succeeding legislature.

It should be noted that the constitutional revision committee and the special session of the 1968 Legislature rejected any change in the names of the constitutional offices commonly referred to as the cabinet except that the superintendent of public instruction was renamed commissioner of education.

The department of state, division of elections, which is charged with the administration of the election laws, has made an administrative determination that the proper designation on the 1970 primary and general election ballot should be for the office of "Treasurer" rather than "Insurance Commissioner and Treasurer." The person attaining said office would assume the constitutional office of treasurer, perform the duties provided therefor in the constitution, as amplified by Ch. 18, F. S., and would also assume the duties of insurance commissioner and state fire marshal and such other duties as may be required now and hereafter placed under the constitutional office by the legislature.

In case of doubt as to the meaning of a statute, departmental construction will be given great weight, and courts do not usually adopt a contrary interpretation except for most cogent reasons, except in case such construction is clearly erroneous. Contemporaneous constructions and long acquiescence in a particular construction are entitled to great weight. See AGO 066-89, Sept. 19, 1966, Biennial Report of the Attorney General, 1965-1966, p. 366, and authorities cited therein.

The construction of Ch. 69-106, Laws of Florida (Ch. 20, F. S.), in conjunction with the 1968 State Const., by the secretary of state, together with the failure of the constitutional revision committee and the special session of the 1968 Legislature to change the name of the constitutional office of treasurer amounts to a departmental and contemporaneous construction of the statutes and laws of Florida which cannot be changed by this office.

Thus, it is my opinion that the designation used in the 1968 State Const. of "Treasurer" is the designation which should be used on the primary and general election ballots for the 1970 election.

070-118—August 31, 1970

#### ELECTORS AND ELECTIONS

##### ELECTIVE OR APPOINTIVE OFFICERS AS CANDIDATES— APPLICABILITY OF § 99.012, F. S., AS AMENDED BY CH. 70-80, LAWS OF FLORIDA, TO CANDIDATES FOR MUNICIPAL OFFICE

To: John M. Starling, City Attorney, Titusville

#### QUESTIONS:

1. Does § 99.012, F. S., as amended by Ch. 70-80, Laws of Florida, apply to candidates seeking the office of municipal councilman?

2. Do the positions of assistant public defender, principal of junior high school, member of city human relations commission, city shoreline authority, etc., held by candidates for the post of municipal councilman, come within the phrase "another elective or appointive office" so as to require a resignation of these posts to qualify for the city office?

Section 99.012(2), F. S., as amended, provides in part:

No individual may qualify as a candidate *for public office* who holds another elective or appointive office, whether state, county or municipal, the term of which or any part thereof runs concurrently with the term of office for which he seeks to qualify without resigning from such office not less than ten days prior to the first day of qualifying for the office he intends to seek. . . . (Emphasis supplied.)

Since it is clear that the position of city councilman in your city is an elective public office, the language above would cover the qualifications by a candidate for this position. The answer to your first question must therefore be in the affirmative.

You further inquire as to whether certain positions presently held by candidates for the post of city councilman come within the phrase "another elective or appointive office" so as to require a resignation from these posts to qualify for the city office. The first candidate, you advise, is an assistant public defender. This position is authorized in § 27.53(1), F. S., which states in part as follows: "the public defender may also hire assistant public defenders . . . ."

No tenure or specific official duties are designated and the salary is not set by statute. It is my opinion that such a position would not constitute an "office" for purposes of Ch. 70-80, Laws of Florida, and this act would not require resignation from this post.

The second candidate, you advise, is principal of a junior high school. I find no statutory language which would indicate that this position is an "elective or appointive office," sufficient for Ch. 70-80, Laws of Florida. This candidate would therefore not be required to resign by the above law either.

The third candidate holds three posts: 1. A member of the human relations commission of the City of Titusville, 2. A member of the Titusville shoreline authority, and 3. A member of the citizens advisory committee for community development. A study of the shoreline authority ordinance enclosed in your letter (especially the title "Term of Office" in § 25A-4 and the authority to approve or disapprove dredge applications in 25A-12(1)) indicates that this position is an "office" for purposes of Ch. 70-80, Laws of Florida. The other two positions appear to be merely advisory in nature and therefore not offices within the contemplation of the above law. A resignation in these cases would not be required. As to the shoreline authority position, a resignation would be required by Ch. 70-80 if any part of this term of office ran concurrently with the term of the city councilman post sought by the candidate.

070-119—August 31, 1970

#### TAXATION

#### COLLECTION OF MUNICIPAL TAXES BY COUNTY TAX COLLECTOR UNDER §§ 167.434 AND 167.437, F. S. (§§ 10 AND 13, CH. 69-54, LAWS OF FLORIDA)

To: W. H. Meeks, Jr., Tax Collector, Fort Lauderdale

#### QUESTIONS:

1. May contracts for the collection of municipal taxes under Ch. 69-54, Laws of Florida, provide for waiver by the municipality of an additional bond for the county tax collector?

2. If an additional bond is required, by whom should the cost be borne?

In answer to question 1, the controlling statutory provision is § 10 of Ch. 69-54, Laws of Florida, now appearing as § 167.434(5), F. S., as follows:

Each county tax collector shall enter into an additional bond with good and sufficient surety, conditioned to duly and faithfully account for the additional taxes required to be collected by him under this act. The form, amount and surety of such bond shall be approved by the governing body of each municipality within the county for which collections are made under this act.

Your question may in my opinion be answered in the affirmative because the statute vests in the municipal governing body the unrestricted right to determine "the form, amount and surety of such bond." Legislative authority to determine the amount and conditions of a surety bond has been construed to permit waiver. *State v. Garrett*, Fla. 1937, 178 So. 309. That construction of the statute now in question appears to be reasonable in view of the fact that existing bonding provisions for the faithful performance of duties by the collector and his employees may be considered by a municipal governing body to be sufficient in form and amount. The law, however, also clearly vests in the municipality the right to specify an additional amount of surety.

In answer to question 2, § 13 of Ch. 69-54, Laws of Florida (§ 167.437, F. S.), provides:

The governing body of the county, or other concerned county officials, shall negotiate a contract with each municipality within the county to compensate the offices of the county tax assessor and county tax collector for the value of service performed under this act.

Since the statute does not otherwise provide for assumption of bonding costs, negotiation of a contract "for the value of service performed" would apparently contemplate an express provision for bond costs to be borne by the collector if that cost is intended by the parties to be paid from the sum designated as compensation for services. In the absence of any expression on the point in the contract form forwarded by you, the sum agreed upon would appear to be attributable solely to the value of services performed under the act, and would not imply an obligation by the collector to pay therefrom the cost of any additional bond which may be required.

070-120—September 1, 1970

MUNICIPAL ZONING

STATUTORY REQUIREMENT FOR HEARING ON PROPOSED  
CHANGE IN ZONING CLASSIFICATION OF ONE OR  
MORE PARCELS—§ § 176.051 AND 133.19, F. S.

To: William A. Norris, Jr., City Attorney, Bartow

QUESTION:

Should the notice required by § 176.051, F. S., 1970, be given by the governing body of the city or by the advisory zoning commission or by both?

As originally enacted by Ch. 69-119, Laws of Florida, the statute referred to the "zoning authority" of both a city and a county. (It has been carried forward, as to municipalities, by § 176.051, F. S., and as to counties by § 133.19, F. S.) It requires the "zoning authority" of the city or county to notify the owners by mail when it proposes a change in zoning classification of a single parcel or a group of not more than five hundred parcels. I have little difficulty in concluding that the "zoning authority" contemplated by the statute is the governing body of the city or county.

It is well settled in this state that the hearing that is a prerequisite to the validity of a zoning ordinance or amendment thereto is "to be provided by the governing body of the town rather than by the Zoning Board, which was created merely as an advisory body, without legislative power." *Town of Hillsboro Beach v. Weaver*, Fla. 1955, 77 So.2d 463. This is in accord with the general rule prevailing in other jurisdictions. See *Yokley Zoning Law and Practice Supplement*, §§ 5-6, p. 44, in which it was noted that "the purpose of a public hearing is to insure that the current view of local residents will be taken into account by a council when it considers the enactment of a proposed zoning ordinance." Accord: *Towle v. Nashua*, N.H. 1965, 212 A.2d 204; *Jack v. Tarrant*, Conn. 1950, 71 A.2d 705; *Crozier v. County Commissioners*, Md. App. 1953, 97 A.2d 296, 298; *Daniel D. Rappa, Inc. v. Hanson*, Del. 1965, 209 A.2d 163. In the two cases last cited, the courts referred to the legislative bodies of the county charged with the responsibility of amending the zoning ordinance as "the zoning authorities."

Under both the charter of the City of Bartow, Ch. 63-1109, Laws of Florida, and our general law, § 176.07, F. S., a zoning commission is advisory in nature, with the duty and responsibility only to make recommendations concerning zoning legislation. It is not an "authority" as that term is ordinarily used to indicate a special statutory agency created by the legislature to carry out a particular state, county, or municipal function.

I have the view, therefore, that the "zoning authority" of the city that must give the notice required by § 176.051, F. S. (and also by § 133.19, F. S., as to county zoning) is the governing body of the city—in this case, the city commission—and not the advisory zoning commission. The advisory commission or board may, of course, be required by other provisions of general or local law to give notice prior to holding hearings precedent to the preparation of its recommendations; however, it is not, in my opinion, a "zoning authority" within the purview of § 176.051, F. S.

070-121—September 2, 1970

#### POLLUTION CONTROL

#### OIL SPILL PREVENTION AND POLLUTION CONTROL ACT, CH. 376, F. S.—RESPONSIBILITIES OF THE DEPARTMENT OF NATURAL RESOURCES AND DEPARTMENT OF AIR AND WATER POLLUTION CONTROL— CONFLICT OF LAWS

To: *Henry B. Saylor, State Senator, St. Petersburg*

#### QUESTIONS:

1. Does the oil spill prevention and pollution control act, Ch. 70-244, Laws of Florida (Ch. 376, F. S.), conflict with the Florida air and water pollution control act, Ch. 403, F. S.?



2. If the provisions of such legislation are in conflict, upon which agency would responsibility for the matter in the area of conflict devolve?

3. Are these laws in direct conflict with the concept of governmental reorganization, and which agency would be the actual pollution control agency for Florida?

In answer to question 1, since the definition of "pollution" in § 3(8) of the Oil Spill Prevention and Pollution Control Act, Ch. 70-244, Laws of Florida (§ 376.031(8), F. S.), is identical in wording to the definition of pollution in the Florida Air and Water Pollution Control Act, § 403.031(3), F. S., the two acts shall be considered in reference to each other. 30 Fla.Jur., *Statutes*, § 107. Inasmuch as they deal with the same specific subject—that is, pollution control generally—the creation, functions, powers and duties of both departments should be read in *pari materia*.

Considering the statement of Judge Cross in *Lanier v. Bronson* (4 Fla.App.1968), 215 So.2d 776, 778, that one should consider

... the general policy of the law on the subject, the objects which the legislature had in mind in the enactment of the legislation, the purposes sought to be accomplished by such legislation, and the nature of the subject being legislated upon in order to determine as nearly as we can just what the legislature intended the law to be,

we have examined the expressed intent of the two acts.

The legislative intent expressed in § 2, Ch. 70-244, Laws of Florida (§ 376.021, F. S.), would appear to be directed toward an objective of agency control of (1) the use of seacoast areas for public and private recreation; and (2) the protection of the coastal waters, estuaries, and lands adjoining the seacoast from the hazards of pollution occurring in the transfer of oil and pollutants from vessels and onshore or offshore facilities.

The liberal construction of the Oil Spill Prevention and Pollution Control Act shall be liberally construed to effect the purposes of Ch. 70-244, Laws of Florida (Ch. 376, F. S.), and the Federal Water Quality Improvement Act of 1970 (see § 21, Ch. 70-244, Laws of Florida (§ 376.21, F.S.), pursuant to the legislative intent as expressed in § 2(6), Ch. 70-244 (§ 376.021(6), F. S.):

... that it is the intent of this act to support and complement applicable provisions of the federal water quality improvement act of 1970, specifically those provisions relating to the national contingency plan for removal of oil and other pollutants.

One can only conclude from this that the department of natural resources has been given the state responsibilities that may accrue under § 102, Public Law 91-224, 84 Stat. 91, New Sections 11 and 12, entitled "Control of Pollution by Oil" and "Control of Hazardous Polluting Substances." These two new sections of the amended Federal Water Pollution Control Act (see 33 USCA 466 H-1) appear primarily to relate to the control of pollution from vessels and onshore or offshore facilities affecting navigable waters, adjoining shorelines and waters of the contiguous zone of this nation, and, in this instance, the lands and waters of the sovereign State of Florida and her people.

On the other hand, the Florida Air and Water Pollution Control Act (Ch. 403, F. S.), as originally adopted, Ch. 67-436, Laws of Florida, was apparently intended as a total comprehensive revision of air and water

pollution control laws of Florida at that time. It vested the state regulatory responsibilities in a single agency, with a provision for delegated authority to local pollution control programs (§ 403.182, F. S.).

Under § 403.261, F. S.:

All rule-making jurisdiction over air and water pollution matters held by other agencies within the state on September 1, 1967, is hereby repealed including, but without limitation, such jurisdiction held by the Florida State Board of Health, the Game and Fresh Water Fish Commission, the State Board of Conservation and the several water management districts within the state.

Though Ch. 70-244, Laws of Florida(Ch. 376, F. S.), would on first impression appear to be in conflict with Ch. 403, F. S., as it relates to the former board of conservation, now the department of natural resources. However, this apparent conflict is mitigated by specific provisions of Ch. 70-224, as follows: Section 5(1)[376.051(1), F. S.] provides that

... The department of air and water pollution control is directed to cooperate with the department of natural resources and to offer consultative services, enforcement, prosecution and technical advice to the department [of Natural Resources]....

Section 9(§ 376.10, F. S.) requires that

... The department [of Natural Resources] shall periodically consult with other departments of the state and specifically with the department of air and water pollution control relative to procedures for the prevention of discharges of oil and other pollutants into the coastal waters of the state from offshore drilling production facilities.

Under § 20(§ 376.20, F. S.), "Nothing in this act shall be deemed to apply to ... industrial effluents discharged into the waters or atmosphere of the state pursuant to a permit issued by department of air and water pollution control."

In situations such as this, where we have a comprehensive law like Ch. 403, F. S., and a later act like Ch. 70-244, Laws of Florida(Ch. 376, F. S.) embracing only a particular aspect of the same subject, the statute relating to particular part of the general subject of pollution control will operate as an exception to, or a qualification of, the terms of the general law, Ch. 403, F. S. See *State v. Givens* (1904), 48 Fla. 165, 37 So. 308; *State v. McMillan* (1908), 55 Fla. 246, 45 So. 882; *City of St. Petersburg v. Pinellas County Power Co.* 1924, 87 Fla. 315, 100 So. 509, all of which are recognized by the Sup. Ct. in *Markham v. Blount* (Fla.1965), 175 So.2d 526, 528, as landmark decisions touching on the construction and application of two statutes on a similar subject. "Where possible, that construction should be adopted which harmonizes and reconciles statutory provisions, and ... should endeavor to find a reasonable field of operation that will preserve the force and effect of each." *Ideal Farms Drainage District v. Certain Lands*, Fla.1944, 19 So.2d 234.

Accordingly, in view of the limited application of Ch. 70-244, Laws of Florida(Ch. 376, F. S.), as indicated in § 20, *supra*, and the legislative guidance to construction expressed in § 21, *supra*, I am of the opinion that the Oil Spill Prevention and Pollution Control Act, Ch. 70-244(Ch. 376, F. S.), does not conflict with the Florida Air and Water Pollution Control Act, Ch. 403, F. S., 1969.

As to question 2, 1 Fla.Jur., *Administrative Law*, § 74, states that:

Where different state agencies are empowered to act with reference to the same subject matter, it should be kept in mind that a policy of forbearance and cooperation in obeying the law in the interest of the public welfare is expected of all officials.

See *Hess v. Roberson* (1914), 67 Fla. 45, 64 So. 449. I must assume, therefore, that the heads of the agencies involved in the application of Ch. 403, F. S., and Ch. 70-244, Laws of Florida (Ch. 376, F. S.), will cooperate to avoid any conflicts which may arise in the application of the respective laws. But, if they do not, then the agencies should be aware that, as the court stated in *State v. City of Boca Raton* (Fla. 1965), 172 So.2d 230, 233, "the last expression of the legislative will is the law in cases of conflicting provisions in the same statute or in different statutes; the last in the point of time or order of arrangement in such statutes prevails." Question 2 is answered accordingly.

In answer to question 3, the 1968 Revised State Const., Art. II, § 7, states: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." Article IV, § 6, State Const., in part, only requires that: "All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution."

Thus, the two agencies involved possess no specific claim of authority under the State Constitution as does the existence of the Game and Fresh Water Fish Commission under Art. IV, § 9. Therefore, the existence and extent of authority to be given to either the department of air and water pollution control or the department of natural resources is a legislative matter to be decided upon by that branch of government.

The Governmental Reorganization Act of 1969 provides no guarantee for the existence or nonexistence of an agency, Section 2(3) of Ch. 69-106, Laws of Florida (§ 20.02(3), F. S.) states: "Structural reorganization should be a continuing process through careful executive and legislative appraisal of the placement of proposed new programs and the coordination of existing programs in response to public needs." Therefore, the determination of what constitutes an "adequate provision . . . by law for the abatement of air and water pollution . . ." is left entirely to legislative discretion.

To answer your inquiry as to whether or not Ch. 70-244, Laws of Florida (Ch. 376, F. S.), is in conflict with the concepts of the Governmental Reorganization Act of 1969 would require my passing on a matter of legislative discretion which rests solely within the province of the Florida Legislature. Therefore, in accordance with a long-standing policy of the Department of Legal Affairs, I decline to render an opinion in this matter.

As to the remaining part of question 3, the department of air and water pollution control continues to be the responsible pollution control agency for the state, subject only to matters directly relating to oil and other pollutants which may be spilled in the coastal areas subject to control of the department of natural resources under Ch. 70-244, Laws of Florida (Ch. 376, F. S.). Question 3 is answered accordingly.

In summary:

1. Chapter 70-244, Laws of Florida, 1970 (Ch. 376, F. S.), and Ch. 403, F. S., 1969, are not in conflict.
2. A pollution incident in coastal waters involving vessels, offshore drilling, or terminal facilities is the responsibility of the department of

natural resources, while the department of air and water pollution control is responsible for industrial effluents relating to production and other discharges not specifically covered by Ch. 70-244, Laws of Florida (Ch. 376, F. S.).

3. The department of air and water pollution control remains the actual pollution control agency of this state, except as to the provisions of Ch. 70-244, Laws of Florida (Ch. 376, F. S.).

070-122—September 2, 1970

#### TAXATION

#### OCCUPATIONAL LICENSE TAX, PERSONAL PROPERTY TAX—AMENABILITY OF CONTRACTORS DOING CONSTRUCTION WORK FOR GOVERNMENTAL AGENCIES

To: Rudy Underdown, Tax Collector, Titusville

#### QUESTIONS:

1. Are contractors who operate or perform work in Brevard County on federal, state, county and city projects such as roads, sewers, buildings, etc. subject to state and county occupational licenses?

2. Is their equipment subject to county personal property taxation?

Question 1 is generally answered in the affirmative. Sovereign immunity from taxation is not extended to corporations or individuals contracting with the government "merely because their activities are useful to the government." *Esso Standard Oil v. Evans*, 345 U.S. 495, 97 L.Ed. 1174, 1181, 73 Sup. Ct. 800 (1953). However, when an act of Congress or the state legislature specifically exempts all activities of the act, a contractor may be exempt if, by the terms of the law, he is deemed a government agent performing a government function. *Carson v. Roave-Anderson Co. et al.*, 342 U.S. 232, 96 L.Ed. 257, 72 Sup. Ct. 257 (1952). Unless he qualifies as an "agent" of the government, a contractor who contracts with a governmental unit to construct, alter, etc., is not an agent of said government, but is an independent contractor. *James v. Dravo Contracting Co.*, 302 U.S. 134, 82 L.Ed. 155, 58 Sup. Ct. 208, 114 A.L.R. 318; *J. W. Meadors & Co. v. State* 1954, 89 Ga. App. 583, 80 S.E. 2d 86. Under such circumstances, a contractor could be exempt when working on state, county, or city projects. It should also be noted that if the contractor's work is on a federal reservation where the State of Florida has ceded exclusive jurisdiction, said contractor cannot be subject to state and county occupational licenses. Attorney General Opinion 067-16, Mar. 31, 1967, Biennial Report of the Attorney General, 1967-1968, p. 28. In all other instances there should be no exemption.

My conclusion is based on the standard set forth by the Supreme Court of Florida in *Harper v. England*, Fla. 1936, 168 So. 403, 406:

[H]e who would shelter himself under an exemption clause must clearly show that he is entitled under the law to exemption, and the law is to be strictly construed as against the person claiming the exemption and in favor of the public.

If there is no specific exclusion of government contractors, the contractors appear to be subject to their share of the tax burden.

The answer to question 2 is also generally affirmative. The equipment is not subject to county personal property taxation if located on a



federal reservation where exclusive jurisdiction has been ceded. *I.B.M. Corp. v. Vaughn* 1957, 98 So.2d 747. However, the general presumption against exemption applies, and there is no general exemption statute excluding contractors for government jobs from taxation of personal property. Therefore, such property should be taxed, except for that on certain federal reservations.

070-123—September 10, 1970

#### TAXATION

#### ZONING OF LANDS AS AGRICULTURAL—FACTORS TO BE CONSIDERED IN DETERMINATION— CONSTRUCTION OF FORMER § § 193.201 AND 193.461, F. S.

To: *Doyle Conner, Commissioner of Agriculture, Tallahassee*

#### QUESTION:

Is it proper for county agricultural zoning boards, in making their determination as to whether leased lands should be zoned as agricultural or nonagricultural, to take into consideration the nature of the lessor's business activity over and above, or to the exclusion of, the primary use of such leased lands by the lessee, and to zone the leased lands as nonagricultural?

Prior to the enactment of Ch. 67-117, Laws of Florida, the provisions of Florida law relating to "zoning" of agricultural lands was embodied in § 193.201, F. S. Subsection (1) of that section provided:

(1) The board of county commissioners of any county in the state is hereby authorized and empowered in its discretion to zone areas in the county *exclusively* used for agricultural purposes as agricultural lands; provided said lands have been used *exclusively* for agricultural purposes for five years prior to such zoning. (Emphasis supplied.)

The agricultural zoning law (§ 193.461, F. S.) was changed to provide for a county agricultural zoning board by Ch. 67-117, Laws of Florida. Subsection (3) provides as follows:

(3) No lands shall be zoned as agricultural lands unless a return is made as required by law which shall state that said lands on *January 1* of that year were used *primarily* for agricultural purposes, and the board, before so zoning said lands, may require the taxpayer or his representative to furnish the board such information as may reasonably be required to establish that said lands were actually used for a bona fide agricultural purpose. All lands which are used primarily for bona fide agricultural purposes shall be zoned agricultural. The maintenance of a dwelling on part of the lands used for agricultural purposes shall not affect the right to have such lands zoned as agricultural lands. (Emphasis supplied.)

In addition, the 1968 State Constitution, by Art. VII, § 4, gives sanction to assessing agricultural lands solely on the basis of character or use.

The Florida Supreme Court, in its recent decision of *Walden v. Borden Co.*, 235 So.2d 300 (1970), which involved assessing of lands for the year 1967, discussed the distinction in the old statute, § 193.201, F. S., which required exclusive use for agricultural purposes, and the new statute, § 193.461, F. S., which only requires a primary use. After discussing the facts of that case, the court stated:

We have concluded that the legislative classification of agricultural lands for tax purposes was intended to benefit the owner whose lands are dedicated to the named agricultural purposes "exclusively" so used under old Section 193.201 and "primarily" so used under new Section 193.461 whether such use is being made directly by the owner himself or indirectly through an agent or lessee; and that the legislature did not intend to give preferential tax treatment to land such as that in the instant case that was obviously purchased for use in connection with the company's phosphate operations and is still being used for that purpose, even though it accommodates, also, an incidental use for agricultural purposes. *Our conclusion would be the same were the agricultural operation being conducted by the company itself instead of a lessee.* (Emphasis supplied.)

The court stated that the above quoted conclusion was in accord with *Stiles v. Brown*, 1st DCA case, 177 So.2d 672 (1965) which indicated that, under § 193.20, F. S. "a dual use of the land by the owner would defeat the classification of the land as agricultural."

It is obvious from the reading of the Borden and Stiles cases, as well as other recent decisions of the Florida courts involving assessments, that the facts of each particular case would be controlling. However, under the facts presented in your letter and in view of the change of the Florida law requiring only primary use, as opposed to the previous requirement of exclusive use, your question is answered in the negative.

070-124—September 15, 1970

#### TAXATION

#### MOBILE HOMES—AS MOTOR VEHICLE, AS REAL PROPERTY—CONSTRUCTION OF § § 320.015 and 320.0815, F. S.

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

#### QUESTIONS:

1. May a county tax assessor now lawfully issue a certificate that a mobile home "is included in an assessment" of property for ad valorem taxation upon application by an owner of real property within the county who shows that the home has been acquired by him and permanently affixed to his property after July 10, 1970, with the intent that it be permanently affixed?

2. Would the answer be the same if the mobile home had been permanently affixed to the property prior to Jan. 1, 1970?

Question 1 should, in my opinion, be answered in the negative upon a consideration of the applicable law including amendments effected by § § 2 and 3 of Ch. 70-391, Laws of Florida, (§ § 320.015 and 320.0815, F. S.), providing in material part as follows:

**320.015 Taxation of mobile homes.**—A motor vehicle as defined in paragraph (b) of subsection (1) of section 320.01, Florida Statutes, shall be subject to a license tax as an operable motor vehicle regardless of its actual use unless the vehicle is permanently affixed to the land and taxed as real property. . . .

\* \* \* \* \*

**320.0815 Mobile home required to have either "MH" or "RP" tag attached.**—... mobile homes which are permanently affixed to the land and taxed as real property shall be issued "RP" series license plates... upon the registered owner's production of a certificate of the respective tax assessor that such mobile home *is included in an assessment* of the property of such registered owner for ad valorem taxation... (Emphasis supplied.)

In the context of this statute I believe the word "assessment" in the section last quoted means valuation. It is apparent, therefore, that under our statutes the facts first stated do not indicate that the mobile home in question "is included" at this time in a valuation of property for ad valorem taxation, even assuming it is now a part of the real property to which it is affixed, and taxable as such. Attorney General Opinion 069-33, of this publication. Although § 193.071(4), F. S. 1969, provides in effect for the assessment of real property as unimproved land when improvements are not added until after January 1 of any year, this does not in my opinion permit or support the finding required for your certification under Ch. 70-391, Laws of Florida (§ 320.0815, F. S.), as to a particular class of "improvements," i.e. the finding that a mobile home is in fact included in an assessment for ad valorem tax purposes.

This conclusion is further buttressed by the provision in § 2, Ch. 70-391, Laws of Florida (§ 320.015, F. S.), imposing a license tax on mobile homes unless they are both permanently affixed to land and *taxed* as real property. Considering that language in conjunction with the following section, the apparent intent is to use "taxed" interchangeably with "included in an assessment," and not necessarily contemplating proof of an actual levy (cases collected Vol. 41, Words and Phrases, p. 307).

The statute, however, certainly requires something in addition to permanent affixation to land as a predicate for issuance of the certificate which will make a mobile home eligible for "RP" license plates. In the absence of a clear legislative delineation, a reasonable construction of the law would preclude such certification for a mobile home which was not a part of real property within the county on January 1, such property being taxable and assessable as of that date under our law. § 192.021, F. S.

Your second question is answered accordingly: If the mobile home was permanently affixed to the property on January 1, 1970, such circumstance would indicate it is included in an assessment of property for ad valorem taxation, under statutes defining the duty to assess real property to include all fixtures and improvements. § 192.031, F. S.

It would appear also that the attachment of the mobile home to real property and its taxation as such would destroy or extinguish its use as a mobile home and form a basis for refund for the period of motor vehicle tag life beyond the applicable January 1 tax day for real property, under § 320.15, F. S., authorizing refunds for the unexpired period of licenses on vehicles destroyed or permanently removed from the state. Although I have previously concluded that the statutes do not provide for pro rata refunds of motor vehicle license taxes generally, the opinion notes that when ad valorem taxes are imposed on trailers then license taxes paid for that year would constitute the payment of a tax when no tax was due within general refund statutes. Attorney General Opinion 066-6, Feb. 7, 1966, Biennial Report of the Attorney General, 1965-1966, p. 224. No consideration appears to have been given to what constitutes a destruction of such property under § 320.15, and the

opinion seems to me to be consistent with the application of the statute to permit refund of a license tax attributable to the period after the January 1 tax day in the situation above considered.

070-125—September 15, 1970

**REGULATION OF VOCATIONS  
FITTING AND SELLING OF HEARING AIDS—CONSTRUCTION  
OF LICENSING REQUIREMENTS**

To: *James A. Bax, Secretary, Department of Health and Rehabilitative Services, Tallahassee*

**QUESTION:**

Must an individual be engaged in all three activities of measuring, fitting and selling, as prescribed in § 468.122(6), F. S., in order to be subject to the registration and other requirements of part III, Ch. 468, F. S., or would any one or combination of two such activities make an individual amenable to said requirements?

The particular statute to which you refer was Ch. 67-423, Laws of Florida, which became effective Jan. 1, 1968, and since such date has not been judicially interpreted. In order to answer your question properly, attention must be directed to the controlling Florida law on statutory construction with particular emphasis on that dealing with the construction of the conjunctives "and" and "or."

Two of the most fundamental rules of statutory construction are that courts should construe a statute so that the plain intent of the legislature is given effect and that courts should not construe a statute in such a manner as to reach an absurd conclusion if any other construction is possible. *State Department of Public Welfare v. Bland*, (Fla. 1953) 66 So.2d 59; *Pinellas County v. Woolley*, (Fla. App. 1966) 189 So.2d 217.

In *Payne v. Payne*, (Fla. 1921) 82 Fla. 219, 89 So. 538, the Florida Supreme Court was faced with the problem of interpreting the conjunctive "and" in a statute which used such word to connect several elements of proof. In adopting the rule of the interchangeability of the words "or" and "and," the court stated:

Statutes must be so construed as to give effect to the evident legislative intent, even if the result seems contradictory to rules of construction and the strict letter of the statute; particularly does this rule apply when a construction based upon the strict letter of the statute would lead to an unintended result that defeats the evident purpose of the Legislature. (Emphasis supplied.)

Statutes should be so applied as to effectuate the law making intent and purpose.

The court went on to hold that the word "and" in the statute was not intended to make the elements of proof conjunctive or interdependent.

More recently, in *Dotty v. State*, (Fla. App. 1967) 197 So.2d 315, *Payne v. Payne*, *supra*, was cited as authority for the proposition that the rule of the interchangeability of the words "or" and "and" still exists in Florida in order to carry out the clear legislative intent behind a particular statute and to prevent an unintended result from occurring.

Section 468.121, F. S., specifies that the purpose of part III of Ch. 468, F. S., in requiring the registration of persons engaged in the fitting



and selling of hearing aids is to protect the public, encourage better educational training programs for such persons, and provide against unethical and improper conduct by such persons. Section 468.124, F. S., empowers an advisory council to recommend to the division of health a code of ethics for the betterment and improvement of the standard of services and procedures to be followed by such persons and for the protection of the public.

Little reflection is required in order to realize the need for such requirements in a state so heavily populated by elderly citizens. Such a statute and its provisions are obviously for the benefit and protection of the public when such public is engaged in the purchase of hearing aids. That irreparable damage could be done to such citizens by the actions of improperly trained persons is too manifest to be further mentioned. It is evident that such a laudatory and exemplary purpose as the statute embodies would be defeated, and an unintended result would occur, if such statute were to be interpreted as covering only one engaged in all three of the activities mentioned, and one could escape such statute by performing only one or two of such activities. That such a result was not intended by the legislature is made clear by § 468.134(1), F. S., where it is said: "No person shall fit, sell, or repair hearing aids in this state unless such person has complied with the requirements hereof as to registration and licensing. . . . (Emphasis supplied.)"

Additional clarification as to the legislative intent may be gleaned from an examination of the official title of the Act itself, as found in Ch. 67-423, Laws of Florida, where the following has been incorporated into such title: "... providing qualifications for persons selling hearing aids, and for persons fitting hearing aids; placing regulation of such persons under the state board of health . . . ."

The precise wording used, and, in particular, the positioning of the comma, would clearly seem to indicate a legislative recognition of the possible divisibility of the activities encompassed by such act and a corresponding legislative intent to regulate the same. That an official title of a legislative act may be resorted to as an aid in construing and determining the legislative intent behind the adoption of an act has long been established by the courts of this state, and may properly be considered as evidence of such intent. *Curry v. Lehman*, (Fla. 1908) 55 Fla. 847, 47 So. 18; *Foley v. State ex rel. Gordon*, (Fla. 1951) 50 So.2d 179; *County of Hillsborough v. Price*, (Fla. App. 1963) 149 So.2d 912.

Therefore, it is my opinion that a person is covered by the licensing requirements of part III, Ch. 468, F. S., entitled "Fitting and Selling of Hearing Aids" if such person engages in one or more of the enumerated activities therein specified.

070-126—September 18, 1970

#### TAXATION

#### TAX ROLL PROPERTY ASSESSED IN MORE THAN ONE NAME

To: *James W. Bass, Tax Assessor, Fort Pierce*

#### QUESTIONS:

1. When a nonowner possessor of land files an affidavit with the tax assessor pursuant to § 95.19(3), F. S., wherein affiant requests the assessor to assess the property to the affiant, what is the assessor's duty?

2. If those persons presently assessed for the property in question object to losing their property in this manner, in what position does this place the assessor?

Apparently the affiants are attempting to gain title to the property in question by adverse possession. However, this is immaterial in relation to the assessor's duty.

The assessor's duty is clearly set forth in § 193.051, F. S., which states in pertinent part that "... when a return of any piece or parcel of property is returned by more than one person the county assessor of taxes shall write the names of all claimants opposite said description of land ...."

Although § 49 of Ch. 70-243, Laws of Florida, repealed § 193.051, F. S., said section is not effective until January 1, 1971. Even after that date it would appear that the same procedure could be followed, since Ch. 70-243 makes no provision to the contrary, and the procedure would not prejudice anyone's title to the property.

Therefore, the assessor should assess the property in the names of all persons who return the property for taxes and those persons whose ownership is reflected in instruments recorded in the public records of the situs county. Section 11, Ch. 70-243, Laws of Florida (§ 193.052, F. S.).

In answer to your second question, the property owners do not, of course, lose their title by having the property assessed in someone else's name. It should be borne in mind that the assessment is against the land and in no way acts as a conveyance to the person returning the property for taxes.

The tax assessor's position in following the above procedure would appear to be sound.

070-127—September 18, 1970

#### PROBATION

##### VIOLATION OF CONDITIONS OF PROBATION—DUTIES OF PROBATION AND PAROLE COMMISSION

To: *J. Hopps Barker, Chairman, Florida Probation and Parole Commission, Tallahassee*

#### QUESTIONS:

1. When, upon being arrested and brought before the court on a charge of having violated the conditions of his probation, a probationer is released with or without bail to await a further hearing, is it the duty of the probation and parole commission to continue to supervise such probationer under the conditions set forth in the original probation order while he is thus released, and is such probationer required to abide by the conditions of said order of probation while thus released?

2. When a parolee has been arrested on a charge of violating the conditions of his parole and has been admitted to bail pending a hearing before the probation and parole commission, is it the duty of said commission to continue to supervise such parolee while he is thus released on bail, and is such parolee required to abide by the conditions of his parole while thus released?

#### AS TO QUESTION 1:

Section 948.01, F. S., authorizes the courts to place defendants on probation in certain criminal cases and subsection (3) of said section provides that when probation is to be granted, the defendant shall be placed under the supervision and control of the parole and probation

commission for the duration of the probation and further provides that: "...the said commission shall thereupon and thereafter, *during the continuance of such probation*, have the supervision and control of the defendant." (Emphasis supplied.)

Section 948.04, Florida Statutes, provides that: "...*During the period of probation* the probationer shall perform the terms and conditions of his probation." (Emphasis supplied.)

Does the arrest of a probationer on a charge of having violated the conditions of his probation, and his release with or without bail pending a hearing, terminate the continuance of such probation? Does it bring to an end the period of probation? I think not.

Section 948.06, F. S., provides that when a probationer is arrested on a charge of having violated the conditions of his probation, he shall be brought before the court which granted the probation; that if such charge is admitted to be true, the court may forthwith revoke, modify, or continue probation; that if such violation is not admitted by the probationer, the court may commit him or release him with or without bail to await further hearing; and that after such hearing the court may revoke, modify or continue the probation.

When a probationer, arrested and brought before the court on a charge of having violated the conditions of his probation, does not admit such charge and is released with or without bail to await a further hearing, this does not terminate the probation theretofore granted by order of the court. This is but a step toward a hearing to be held for the purpose of determining whether the probation should be revoked or not.

As above stated, § 948.06, F. S., provides that *after such hearing* the court may revoke, modify, or continue the probation, and thus completely negates any idea that the probation came to an end when the probationer was released with or without bail to await a further hearing, since a probation which has been terminated cannot be revoked, modified or continued.

It is my opinion that when a probationer is released with or without bail to await a further hearing, he remains subject to and must comply with the conditions of his probation while thus released, and that it is the duty of the commission to continue to supervise him while he is thus released.

A contrary holding could lead to incongruous results. It would mean that while a probationer is released with or without bail to await a further hearing, he could violate any or all of the conditions of his probation without any danger of having his probation revoked because of such violations. Thus, if at the hearing on the original violation charge, the court should find the evidence insufficient to support such charge, it would have to continue the probation because, under any rule contrary to the one here announced, the court could not revoke for violations committed by the probationer while released with or without bail to await a further hearing on the original charge. Such was manifestly not the intent of the legislature when it framed our probation statutes.

As above indicated, it is my opinion that your first question is properly answered in the affirmative.

#### AS TO QUESTION 2:

Section 947.22, F. S., authorizes the issuance of a parole violation warrant by any member of the commission, commanding that the parolee be brought before such member, at which time he may examine the parolee and either commit him to jail pending a hearing before the commission or admit him to bail conditioned for his appearance before the commission.

Section 947.23(1), F. S., provides that as soon as practicable after the arrest of a person charged with violating the terms and conditions of his parole, the commission shall hold a hearing at which the parolee may be represented by counsel and both the parolee and the state may introduce evidence; and that

... Within a reasonable time thereafter the commission shall make findings upon such charge of parole violation and shall enter an order determining whether said charges of parole violation have been sustained. *The commission shall in and by said order revoke said parole and return said person to prison to serve the sentence theretofore imposed upon him, or reinstate the original order of parole, or shall enter such other order as it may deem proper.* (Emphasis supplied.)

This statutory provision commands the commission to revoke the parole or reinstate the original order of parole or enter such order as may be deemed proper. I do not think that the action of the legislature in thus conferring upon the commission the power to "reinstate" the original order of parole means that the said order had previously been revoked or terminated. Nothing had happened that could have revoked or terminated it. The very question for consideration at the hearing before the commission was whether it should be revoked; it could not be revoked if it had already come to an end.

Arresting a parolee and committing him to jail or admitting him to bail to await a hearing does not revoke or cancel the order of parole. Arresting him and committing him to jail to await a hearing temporarily deprives him of his freedom of movement and action, but it does not undo the order of parole. Arresting him and admitting him to bail places upon him the obligation to appear before the commission for a hearing, but it does not do away with the order of parole.

If arresting the parolee and committing him to jail or admitting him to bail rendered the order of parole *functus officio* and lifeless, then a parolee who has been arrested and admitted to bail to await a hearing would not be bound by the conditions of such order while at large on such bail and could violate any or all of such conditions with impunity, since the commission could not revoke his parole because of such violation no matter how serious it might be. That would be an absurd and unreasonable result, one not intended by the legislature and, as the Supreme Court of Florida said in *Johnson v. State* 1956, 91 So.2d 185, 191: "... This construction is squarely in line with the universal rule that statutes must be so construed as to avoid absurd results..." (Emphasis supplied.)

I do not interpret said statutory provision as giving the commission the authority to breathe life into a completely defunct and nonexistent parole. Rather, I interpret it as authorizing the commission to reinstate the parolee to the status that he had before his arrest on the parole violation charge. If he is in jail, this may be accomplished by turning him out under the original order of parole. If he is on bail, it may be done by canceling the bail bond and permitting him to continue under the original order of parole.

Therefore, as above indicated, it is my opinion that your second question should be answered in the affirmative.



070-128—September 22, 1970

## TAXATION

BOARD OF TAX ADJUSTMENT—PAYMENT OF EXPENSES—  
MAINTENANCE OF RECORDS

To: *Miller Lang, Attorney for Board of County Commissioners and for the Tax Adjustment Board, Trenton*

## QUESTIONS:

1. Do Chs. 69-140, 69-356 or Ch. 70-243, Laws of Florida, repeal the provisions of § 193.29[§ 193.381], F. S., if so, does the board of tax adjustment now certify that the tax roll is correct?

2. From what source are funds available to the board of tax adjustment to employ counsel, employ a clerk, pay for supplies and records, and pay for a verbatim record?

3. Is the board of tax adjustment required under these laws to keep permanent (or temporary) records separate and apart from the board of county commissioners and school board, if so, where are same to be kept, and from what source are funds available to pay for records, docket books, and a place of safekeeping for such records?

## AS TO QUESTION 1:

A negative answer appears to be required under current law. Section 193.381(5), F. S., requires that: "... the board of county commissioners shall endorse on them [the tax rolls] a certificate that they have so examined them and that they are correct ...."

Section 194.015, F. S., enacted by Ch. 69-140, Laws of Florida, creates the board of tax adjustment and states in part:

(2) The board of tax adjustment shall adjust the assessment roll, hear complaints against individual assessments, hear complaints against denials of homestead exemption by the tax assessor, and hear applications for exemptions from ad valorem taxation.

This chapter contains no provision for certification by the board of tax adjustment, and for the current year § 193.381, F. S. (repealed effective January 1, 1971, by § 49 of Ch. 70-243, Laws of Florida), requires certification by the board of county commissioners.

Chapter 70-243, Laws of Florida(§ 193.122, F. S.), requires, effective January 1, 1971, certification by the board of tax adjustment, reading in part:

193.122 Certificate of board of tax adjustment and tax assessor.

(1) The board of tax adjustment shall certify each tax roll after all hearings required by section 194.032 have been held and they have satisfied themselves that the rolls accurately reflect the taxability of all property in the county, except such property as may be then before boards of arbitration as provided for in section 194.033, and otherwise meet all requirements imposed by the department. . . .

## AS TO QUESTION 2:

Question two is answered by AGO 070-94, of this publication, and must be controlled by the observations and conclusions stated therein as to these services and comparable expense.

## AS TO QUESTION 3:

The statute does not define the nature or extent of records to be kept by the board of tax adjustment except to state in § 194.032(2), (3), and (5), as amended by § 27 of Ch. 70-243, Laws of Florida, that "the clerk of the governing body of the county shall prepare a schedule of appearances before the board based on petitions timely filed with him;" that "the board, the petitioner, or the tax assessor may require that a verbatim record of the proceedings be made and that proof of any documentary evidence be presented;" and on each controverted complaint the board "shall render a decision . . . within twenty calendar days of the last day the board is in session . . ."

Effective January 1, 1971, §§ 37 and 38 Ch. 70-243, Laws of Florida (§§ 195.022 and 195.032, F. S.), require that the boards of tax adjustment, and other officers, shall use the forms and follow regulations prescribed by the department of revenue to secure uniform administration of tax laws and procedures. Implementation of these provisions will apparently provide some standard for temporary and permanent record keeping. In the absence of such specific instructions, the board in the performance of its duties may be guided by the rule that public records generally include, in addition to records required by law to be kept, those which are "necessary to be kept in the discharge of a duty imposed by law." *Amos v. Gunn* 1922, 84 Fla. 285, 94 So. 615, 634.

The duties imposed by law upon the board of tax adjustment are, of course, separate and distinct from those performed by the bodies from which its component members are appointed. Such records as are necessary to serve as a memorial or evidence of the performance of its duties under the law would therefore constitute separate records of the board of tax adjustment. Authorization for equipment and location of these records would appear to be a function of the board of county commissioners within its authority and duty to designate space in county buildings for the use of county officers and boards in implementation of the constitutional mandate that "in every county there shall be a county seat at which shall be located the principal offices and permanent records of all county officers." Article VIII, § 1(k), State Const., 1968. Sections 125.01 and 125.22, F. S. Attorney General Opinions 064-63, May 18, 1964, Biennial Report of the Attorney General, 1963-1964, p. 341, and 067-23, May 18, 1967, Biennial Report of the Attorney General, 1967-1968, p. 38. Costs incurred in making and keeping such records may be paid in the manner indicated by my opinion 070-94, of this publication for other necessary expense of the board of tax adjustment.

070-129—September 22, 1970

## TAXATION

CERTIFICATION OF COUNTY TAX ROLL—BOARD  
OF TAX ADJUSTMENT

To: W. Wirt Culbertson, Tax Assessor, Miami

## QUESTION:

1. May the 1970 tax roll be certified at a date subsequent to the first Monday in October?
2. May only a portion of the 1970 tax roll be certified, in October, with the remaining portion being certified upon the completion of hearings before the board of tax adjustment?
3. Is the 1970 tax roll to be certified by the board of county commissioners or by the board of tax adjustment?

## AS TO QUESTION 1:

The tax roll may in my opinion be certified after the stated time. Although the currently applicable statute, §193.381(4) and (5), F. S. (repealed effective January 1, 1971 by §49 of Ch. 70-243, Laws of Florida), requires that after equalization, the completed assessment roll with attached affidavit by the county tax assessor shall be turned over to the board of county commissioners "at a meeting to be held *on or before the first Monday in October*," (Emphasis supplied.) and after examination the board "shall endorse on them a certificate that they have so examined them and that they are correct . . .," the date prescribed, under the terms of §197.011, F. S., "shall be deemed and held to be directory only . . ."

Cases cited AGO 056-148, May 14, 1956 Biennial Report of the Attorney General, 1955-1956, p. 653. Failure to comply with the time limitation prescribed by §193.381, F. S., will not, therefore, affect the validity of certification at a subsequent date, and your question is answered accordingly.

## AS TO QUESTION 2:

I believe a negative answer to your second question is required, subject to the exclusion of property before boards of arbitration by the terms of §193.122(1), F. S., added by §18 of Ch. 70-243, Laws of Florida, effective January 1, 1971:

(1) The board of tax adjustment shall certify each tax roll after all hearings required by §194.032 have been held and it has satisfied itself that the rolls accurately reflect the taxability of all property in the county, *except such property as may be then before boards of arbitration* as provided for in §194.033, and otherwise meet all requirements imposed by the department. These certificates shall be attached to each roll as required by the department by regulation. (Emphasis supplied.)

Even if this exception should be regarded as an express statement of what may be implied from the arbitration statute, §194.033, F. S., 1969, which became effective January 1, 1970 (amended by §28, Ch. 70-243, Laws of Florida, presently effective), the exclusion of property subject to arbitration does not in my opinion support a partial certification otherwise, contrary to what appears to be the uniform rule of judicial opinions on this point as stated in *Homer v. Conn. Gen. Life Ins. Co.*, Fla. App. 1968, 211 So.2d 250, 253, *Cert. discharged* 220 So.2d 361; *Allen v. Dickinson*, Fla. 1969, 223 So.2d 310, as follows:

. . . the statute contemplates certification of a single, complete assessment roll which, once endorsed, is not and cannot be subject to changes in assessments . . . And, since the [county] commission may not accomplish by indirection that which it is prohibited from doing directly, the commission may not revise assessments at will merely by withholding certification of a portion of the assessment roll until a later date.

## AS TO QUESTION 3:

Upon analysis and application of the statutes discussed at length in my opinion 070-128 of this publication, I conclude that the 1970 tax roll is to be certified by the board of county commissioners. Section 193.381(4), F. S., 1969, was repealed effective Jan. 1, 1971, by §49, Ch. 70-243, Laws of Florida; §193.122(1), F. S., added by §18, Ch. 70-243, Laws of Florida, effective January 1, 1971.

070-130—September 22, 1970

### NATURAL RESOURCES

#### ENVIRONMENTAL INVENTORY COUNCIL—DUTIES RELATIVE TO PREPARATION OF INVENTORY—§ 370.0212, F. S.

To: *Randolph Hodges, Executive Director, Department of Natural Resources, Tallahassee*

#### QUESTION:

Is the authority of the Florida environmental inventory council, as established by Ch. 70-316, Laws of Florida (§ 370.0212, F. S.), limited solely to advising the department of natural resources with respect to providing a concise environmental inventory of the natural resources of the state?

You state that your purpose in asking the question is prompted by a possible conflict between the title and the body of the act. My study of Ch. 70-316, Laws of Florida, convinces me that there is no conflict between the title and the body of the act. The title gives notice that the legislature intends to create a council which shall be advisory to the department of natural resources. The body of the act proceeds to create the Florida environmental inventory council and to provide for its membership and specify in § 3 the length of time the council is to exist and its purpose for existing, namely: "for the purpose of advising the department of natural resources with respect to providing a concise environmental inventory of the natural resources of the state." Actually, the Florida environmental inventory council is an adjunct to the department of natural resources. This is evidenced by the fact that the department shall call on the council to meet; furnish all necessary staff required to support the activities of the council, which includes the employment of necessary consultants; and contract for other services as are needed, including research in the carrying out of the purposes of the act. It is contemplated that the department will be called upon by the council to pay for technical services and for the scientific studies necessary in the preparation of the council's recommendations.

The creation of a council for study and advice found acceptance as a procedure under the English Judicature Act of 1873, where a council of judges of the Supreme Court was created for the purpose of considering the operation of the new practice and the reporting of any alterations in the law recommended for the administration of justice, 20 C.J.S. 714.

The language of § 3(1) Ch. 70-316, Laws of Florida (§ 370.0212(3)(a), F. S.), indicates a clear intent on the part of the legislature to make the function of the council advisory to the department of natural resources. Section 3(4), Ch. 70-316, Laws of Florida (§ 370.0212(3)(d), F. S.), provides that the department of natural resources shall hold such public hearings as it determines necessary and desirable for the full development of facts pertinent to its studies.

Therefore, you are advised that the authority of the Florida environmental inventory council is limited solely to advising the department of natural resources with respect to providing a concise environmental inventory of the natural resources of the state. It must be remembered the council advises the department with respect to what the inventory should contain. The determination of the concise inventory is a function of the department of natural resources.



070-131—September 30, 1970

## COUNTY DEVELOPMENT AUTHORITIES

PUTNAM COUNTY—ISSUE OF INDUSTRIAL REVENUE  
CERTIFICATES

To: A. W. Nichols, Jr., Clerk, Circuit Court, Palatka

## QUESTIONS:

1. Are lease agreements to private industry on lands owned by the Putnam County development authority (created by Ch. 61-2727, Laws of Florida, as amended by Ch. 69-1522, Laws of Florida) subject to the 4% state excise tax, or is the land simply subject to ad valorem taxation?

2. Are lease payments, or payments for the purchase price of lands, owed to the Putnam County development authority, required to be paid to the authority, and records of the same to be kept by the authority, or may such payments be made to a trustee bank representing bond holders of industrial revenue bonds?

3. May the Putnam County development authority, under the powers granted by the acts by which it was created, or by the powers granted under Ch. 69-104, Laws of Florida (§ § 159.25-159.43, F. S.), or Ch. 70-229, Laws of Florida (§ § 159.44-159.53, F. S.), give a mortgage on lands owned by it and upon which it issues industrial improvement revenue bonds (the Putnam County commission, by ordinance adopted Sept. 15, 1970, conferred the powers contained in Ch. 70-229, Laws of Florida (§ 159.47, F. S.), upon the Putnam County development authority)?

## AS TO QUESTION 1:

Section 7, Ch. 70-229, Laws of Florida (§ 159.50, F. S.), the industrial development authority act, provides as follows:

Tax exemption. The exercise of the powers granted by this act in all respects will be for the benefit of the people of the state, for the increase of their industry and prosperity, and for the improvement of their health and living conditions, and for the provision of gainful employment, and will constitute the performance of essential public functions, and the authority shall not be required to pay any taxes on any project or any other property owned by the authority under the provisions of this act or upon the income therefrom, and the bonds issued under the provisions of this act, their transfer, and the income therefrom (including any profit made on the sale thereof), shall at all times be free from taxation by the state or any local unit or political subdivision or other instrumentality of the state. Nothing in this section, however, shall be construed as exempting from taxation or assessments the leasehold interest of any lessee in any project or any other property or interest owned by any lessee.

It would appear that absent a judicial determination to the contrary, the above language would exempt lease payments made to the development authority from the 4% excise tax on rentals. It further appears that the real property owned by the authority would be exempt from ad valorem taxation, notwithstanding the leasehold interest of the lessee would be subject to such taxation.

## AS TO QUESTION 2:

The Putnam County development authority was established pursuant to Ch. 61-2727, Laws of Florida. Section 11 of said chapter provides: "The books and records of the authority shall be audited at least annually, at the expense of the authority, by a competent auditor. The authority shall furnish copies of said audit to the board of county commissioners of Putnam county."

The above section can be satisfied only by audit of financial records kept by the authority. Thus, payments under the lease should be made to the authority with subsequent disbursement by the authority to the bond holder trustee.

## AS TO QUESTION 3:

The powers and authorities conferred on industrial development authorities by Ch. 70-229, Laws of Florida (§ 159.47, F. S.), are supplemental and in addition to existing powers. Said chapter should not be construed as repealing other provisions of local or general law. Section 8, Ch. 70-229, Laws of Florida (§ 159.51, F. S.). Significantly, the authority has been expressly authorized to mortgage its property to the extent of capital improvements financed by the authority. Section 4(i), Ch. 70-229, Laws of Florida (§ 159.47(9), F. S.).

070-132—October 1, 1970

## PUBLIC OFFICERS

PROHIBITION AGAINST TRANSACTING BUSINESS WITH  
THEMSELVES IN THEIR OFFICIAL CAPACITY—  
§ 112.314, F. S.

To: *Fred O. Dickinson, Jr., State Comptroller, Tallahassee*

## QUESTION:

Are public officials such as state attorneys or public defenders authorized to utilize state funds for the rental of their own personal law libraries, office furniture and equipment, etc., when they serve in an official capacity on a full-time basis?

The standards of conduct law, § 112.314(1), F. S., prohibits a public official from transacting any business with himself or any business entity of which he is an officer, director or member, or in which he owns a controlling interest. A rental agreement would unquestionably be a business transaction within the meaning of this statute.

Moreover, even in the absence of statute, such a transaction is contrary to public policy and is, at least, voidable. In AGO 067-66, Oct. 5, 1967, Biennial Report of the Attorney General, 1967-1968, p. 116, in which a rental contract made by a public official for the lease of office space in a building owned by him was held unenforceable as contrary to public policy, it was noted that "Public officers may not make contracts, in their official capacity, with themselves or become interested in contracts so made, or make contracts which it is their official business to see faithfully performed. . . ." For the reasons stated, your question must be answered in the negative.

070-133—October 1, 1970

**PUBLIC DEFENDERS**

**CONSTRUCTION OF CH. 70-95, LAWS OF FLORIDA  
(GENERAL APPROPRIATIONS ACT), AS TO COM-  
PENSATION OF PUBLIC DEFENDER FOR PERIOD  
JULY 1, 1970 THROUGH  
SEPTEMBER 30, 1970**

*To: R. A. Green, Jr., Public Defender, Gainesville*

**QUESTION:**

Is the public defender of the Eighth Judicial Circuit entitled to additional county compensation for the period July 1, 1970, through Sept. 30, 1970, at the rate of \$5,500 per annum or \$8,000 per annum?

Section 15 of Ch. 70-95, Laws of Florida, raised a full-time public defender's salary from \$19,000 per annum to \$21,500 per annum. The 1970 Act provided that no such public defender shall receive from any county or municipality any supplemental salary which shall make his total salaries exceed \$27,000 per annum and that any supplement provided by special or local act should not be affected or repealed to the extent it does not conflict with the maximum salary therein fixed.

The per annum salary fixed by general law and payable from state funds is for the period July 1, 1970, through June 30, 1971. There can be no doubt that the legislature intended that public defenders should receive no more than \$27,000 as their total compensation for their services during this period. Thus, the fact that the counties in the Eighth Judicial Circuit have budgeted funds to supplement the public defender's state salary that, when added to his state salary, will exceed \$27,000 is immaterial. Under the clear mandate of the statute, the public defender is entitled to receive from the counties' budgeted funds only so much thereof as will not exceed the maximum compensation fixed by the statute, namely, \$27,000 per annum—that is, for the period July 1, 1970, through June 30, 1971. It follows that he is entitled to be compensated at the rate of \$5,500 per annum from county funds.

070-134—October 1, 1970

**CLERKS OF CIRCUIT COURT**

**AUDIT OF EXPENDITURES OF COUNTY FUNDS WHEN  
AUTHORIZED BY ORDINANCE**

*To: Robert W. Zinn, Clerk, Circuit Court, Sarasota*

**QUESTION:**

In absence of general law or special act declaring a public purpose for the expenditure of public funds, does an ordinance validly declare a proper public purpose for the expenditure of funds upon which the clerk of circuit court may rely?"

Under the constitutional and statutory "home rule" provisions, the counties of this state now have all powers of local self-government not inconsistent with general or special law (as to noncharter counties) or with general law (as to charter counties). Article VIII, § 1, 1968 State Const.; § 125.65, F. S., 1970. Since the county ordinance now takes the place of a special legislative act in matters of strictly local concern, it would seem that the clerk's duty and responsibility as *ex officio* auditor

of the county's expenditures proposed to be made pursuant to the authority of a county ordinance would be no different from that required of him in auditing those proposed to be made under the authority of a legislative act. His duty in this respect is well settled. As stated in AGO \*058-236,

The auditing function of the clerk includes more than the arithmetical determination as to the amount of the claim being presented for payment and the clerk has a duty to determine the legality of an expenditure before dispensing public funds. When an examination by the clerk as auditor of a particular claim presented for payment leads him to believe that the expenditure is not authorized by law, or is otherwise illegal, the clerk may properly withhold his approval of payment. This action by the clerk is in accord with the apparent purpose of the constitutional provision, making the clerk of the circuit court ex officio auditor of the county, *which is to provide a check and balance system that insures proper expenditure of public funds.* (Emphasis supplied.)

In *Board of Com'rs v. Board of Pilot Com'rs*, Fla. 1906, 42 So. 697, 702, it was held that the question of what is a "county purpose" is for the courts and that a legislative declaration in this respect will not be interfered with except in cases "free from all reasonable doubt." And it would seem that a legislative declaration in this respect would be as persuasive when made in an ordinance as in a special act of the legislature, so that the clerk could ordinarily rely upon such declaration when the ordinance is not clearly and patently unreasonable or an obvious abuse of discretion.

It appears, however, that the ordinance in question provides that the sum authorized to be disbursed for the county purpose therein specified may be paid out directly to the nonprofit corporate agency in a lump sum. In this connection, your attention is directed to AGO 056-151, May 16, 1956, Biennial Report of the Attorney General, 1955-1956, p. 657, in which one of my predecessors in office held that county funds may not be turned over to a noncounty agency or corporation to be expended by such agency at its discretion and not by county warrant.

070-135—October 1, 1970

#### TAXATION

##### ASSESSOR'S COMMISSIONS ON TAXES ASSESSED FOR FLORIDA INLAND NAVIGATION DISTRICT— IMPLIED REPEALS

To: Harold M. Wayne, Tax Assessor, St. Augustine

#### QUESTION:

Did § 1, of Ch. 70-246, Laws of Florida, reenacting § 192.091, F. S., impliedly repeal § 10 of Ch. 65-900, Laws of Florida, fixing the amount of county assessor's commission for assessing taxes in the counties comprising the Florida Inland Navigation District?

\*Note.—This opinion was omitted from the Biennial Report of the Attorney General, 1957-1958.



Section 10, Ch. 65-900, Laws of Florida, provides in part:

The tax assessor of each of said counties shall be entitled to receive a commission upon the amount of taxes assessed on behalf of said district in the said county of one per cent of the total amount of such taxes assessed by him in said county . . .

A negative answer is in my opinion required by a consideration of the acts in question.

Chapter 70-246, Laws of Florida, reenacted without amendment that part of § 193.65(1)(b), F. S. [§ 192.091(1)(b), F. S.], providing that assessors shall be entitled to receive, upon the amount of all property taxes assessed, the following commissions:

(b) On each taxing district not created or operating under Chapter 378:

1. Three per cent on the amount of taxes levied up to the amount levied on an assessed valuation of fifty million dollars; and
2. Two per cent on the balance.

Section 192.091(6), F. S., also reenacted, provides for election to come under this law by assessors previously receiving compensation under special or local acts. This section would not appear to have reference to an existing provision for rate of commissions on a specific levy such as that stated in Ch. 65-900, Laws of Florida.

Section 6(a), Ch. 70-243, Laws of Florida, also reenacted the provision above quoted, amending it only to add the words "except the nonvoted school tax" after "Chapter 378." The repealer provisions contained in §§ 49 and 48(4), Ch. 70-243, Laws of Florida, do not expressly repeal § 10, Ch. 65-900, Laws of Florida, and I find nothing in either the titles or text of the cited 1970 acts to indicate a legislative intent to accomplish such a repeal.

Section 10 of Ch. 65-900, Laws of Florida, remains, in my opinion, the controlling provision with respect to commissions to be charged for assessment of the district taxes in question, under the well settled rule by which a specific statute is not impliedly repealed by a subsequent general act "if the two may operate upon the same subject without positive inconsistency and repugnancy in their practical effect and consequences . . ." *State v. Gadsden County* 1912, 63 Fla. 620, 58 So. 232; *Sanders v. Howell* 1917, 73 Fla. 563, 74 So. 802.

070-136—October 2, 1970

## REGULATION OF PROFESSIONS AND VOCATIONS

### CONSTRUCTION OF § 477.03, F. S., AS TO WHAT CONSTITUTES COSMETOLOGY

To: Eileen Carlton, Chairman, State Board of Cosmetology, Tallahassee  
QUESTION:

Is the application of a preparation, ointment, or salve to the face or other areas of the human body for the purposes of beautifying or relieving the effect of skin diseases an act of cosmetology within the purview of Ch. 477, F. S.?

Section 477.03(1)(b) and (d), F. S., clearly defines the following acts, when not done for the treatment of disease or physical or mental ailments, as constituting the practice of cosmetology:

\* \* \* \* \*

(b) Facial and scalp massage or treatment with oils, creams, lotions or other preparations.

\* \* \* \* \*

(d) Applying cosmetic preparations, antiseptics, powders, oil, clay, or lotions to scalp, face, or neck.

Section 477.05, F. S., exempts certain classes of persons from the provisions of the chapter, e.g., persons authorized by law to practice medicine, surgery, osteopathy and chiropractic, persons holding a drug-less practitioner certificate under the law, registered nurses, and others.

It is pointed out that within the statutory definition of the practice of cosmetology, acts concerning the treatment of disease or physical or mental ailments are excluded. Thus, the question arises as to whether or not those persons engaged in the healing arts excluded under the provisions of § 477.05, F. S., are the only ones contemplated by the treatment of disease and ailments exclusion contained within § 477.03, F. S.

It would appear that an ambiguity or redundancy exists in § 477.03, F. S., in relation to § 477.05, F. S., for it is not conceivable that the legislature intended to exempt in the definition of cosmetology, as provided by § 477.03, F. S., persons other than authorized lawful practitioners of medicine or the other healing arts, and nurses. A contrary intent would be to sanction the unauthorized practice of medicine, nursing, etc.

When there is an ambiguity in the words employed in a statute or where the context of a statute taken literally conflicts with a plain legislative intent clearly discernible, the context must yield to legislative purpose. (See *Beebe v. Richardson*, 23 So.2d 718 (Fla. 1945)). It was announced in *United Enterprises v. Dubey*, 128 F.2d 843 (5th Cir. 1942) that the legislature of Florida plainly intended by this statute (Ch. 477, F. S.) to prevent the spread of contagious diseases and to insure the adoption to healthful standards throughout the beauty culture industry in the interest of public welfare.

In the advancement of the aforesaid intent, the legislature in regard to Ch. 477, F. S., seemingly would not suggest or permit a person not operating under some appropriate regulatory act, passed pursuant to the state's police power to protect the public's health and welfare, to be exempted from the provisions of Ch. 477, F. S., under the guise of treatment of disease or ailment. Also, such medical practice would be violative of some applicable Florida Statute. Therefore, the exemption stated in § 477.03(1), F. S., must be treated as a redundancy and only considered as relating to the activities of those persons referred to and exempted by the provisions of § 477.05, F. S.

Accordingly, your question must be answered in the affirmative, irrespective of whether there is a claim of treatment of disease or ailment, if the practitioner is not specifically exempted by § 477.05, F. S.

070-137—October 5, 1970

#### OCCUPATIONAL LICENSE TAX

#### EXEMPTIONS—DENTAL TECHNICIANS AND DENTAL LABORATORIES—§ § 205.461, 205.471 AND 466.51, F. S.

To: J. Ed. Straughn, Executive Director, Department of Revenue,  
Tallahassee

## QUESTIONS:

1. Is a dental technician as defined by § 466.51(2), F. S., exempt from an occupational license tax under the provisions of § 205.461(3), F. S.?

2. Is a dental technician performing under a written work order, as provided for by § 466.50, F. S., except those covered by § 466.51(2), F. S., working "under the direct supervision of another person, individual or corporation," as provided for in § 205.461(3), F. S., and therefore exempt from occupational license tax under § 205.461(1), F. S.?

3. Is a dental laboratory as defined by § 466.51, F. S., subject to an occupational license tax under § 205.471(1), F. S.?

Your first question is answered in the affirmative. Your inquiry relates to a dental technician practicing under § 466.51, F. S., which reads:

**466.51 Dental laboratory defined.**—The term dental laboratory as used in this chapter shall be deemed to include any person, firm or corporation who:

\* \* \* \* \*

(2) Excluded from the provisions of § 466.52, shall be those individual dental laboratory technicians who construct or repair dental prosthetic appliances in the office of a licensed dentist for him only and under his supervision and work order.

Section 466.51(2), F. S., must be construed in light of § 205.461, F. S., which reads in part:

(1) Every person engaged in the practice of any profession, who offers his service either directly or indirectly to the public for a consideration, whether or not such endeavor be regulated by law, shall pay a license tax of fifteen dollars for the privilege of practicing, which license shall not relieve the person paying same from the payment of any license tax imposed on any business operated by him.

\* \* \* \* \*

(3) An occupational license shall not be required where a person, although licensed by law under a regulatory statute, is prohibited from engaging in a profession, business or occupation unless under the direct supervision of another person, individual or corporation.

\* \* \* \* \*

Although, strictly speaking, a dental technician is not prohibited from working except under the direct supervision of a dentist, he would have to meet the additional criteria of § 466.52, F. S., if he does not operate in that manner. Thus, this would bring him within the operation of § 205.461(3), F. S.

Therefore, reading §§ 466.51 and 205.461, F. S., in *pari materia*, it becomes clear that a dental technician working under the immediate supervision of a dentist in accordance with § 466.51(2), F. S., is not liable for occupational license taxes under Ch. 205, F. S.

Your second question is answered in the negative. The operation of all dental laboratories in the State of Florida is governed by § 466.50, F. S., which states:

The purpose of §§ 466.50-466.58, and other applicable sections of this chapter, is to safeguard the public health by

requiring that dental laboratories be permitted to operate in this state only upon a written work order of a licensed dentist, either as a registered laboratory or those excluded under § 466.51(2).

Working upon such a written work order is clearly distinguishable from the situation envisioned by § 466.51(2), F. S. The written work order is a guide for the technician, but he is not working, "under the direct supervision of another person, individual or corporation," as provided for by § 205.461(3), F. S. Therefore, a technician working on his own, although necessarily upon a written work order, is not exempt.

Your third question is answered in the negative. It has been demonstrated earlier in this opinion that there are two methods of operating a dental laboratory under § 466.51, F. S. A technician may work under the direct supervision of a dentist or upon written work order. If a person works under the direct supervision of a dentist under § 466.51(2), F. S., he is exempt from occupational license taxation. The dental technician working in that capacity stands as an employee of the dentist and would not be liable for occupational license tax, since his function is incidental to the operation of a dentist's office.

On the other hand, a dental laboratory operating upon written work orders alone would be liable under § 205.471, F. S. This tax is due from the individual laboratory and is based on the number of persons employed.

070-138—October 5, 1970

#### TAXATION

##### APPORTIONMENT OF COUNTY MILLAGE—AUTHORITY OF BOARD OF COUNTY COMMISSIONERS IN CONNECTION WITH COUNTY BUDGET

To: *Board of County Commissioners, Nassau County, Fernandina Beach*  
QUESTIONS:

1. Is the board of county commissioners required to apportion all budgets on a prorated basis?
2. Does § 200.071(2), F. S., authorize the board to reduce the portion of the budget applying to revenue to the tax assessor and to the tax collector, whose fees are fixed by statute?

Both questions should, in my opinion, be answered in the negative. The full text of the statute (amended by Ch. 70-368, Laws of Florida, to add subsection (3), not here relevant) is as follows:

##### 200.071 Limitation of millage; counties.—

(1) Except as otherwise provided herein, no aggregate ad valorem tax millage shall be levied against real and tangible personal property by counties and districts as herein defined in excess of ten mills on the dollar of assessed value, except for special benefits and debt service on obligations issued in connection therewith, and except for that millage authorized in § 9, Art. VII of the state constitution. However, nothing in §§ 200.071, 200.091, 200.111, 200.121, 200.141, and 200.161 shall prevent any board of county commissioners or district school board to each levy at least five mills.

(2) The board of county commissioners in counties not having a budget commission or board *shall have authority*, in



event the aggregate of the proposed millage for said county and districts therein aggregate more than the maximum allowed hereunder, to apportion the millage to be levied for county officers, departments, divisions, districts, commissions, authorities and independent taxing agencies so as not to exceed the maximum millage provided herein under this section or § 200.091. The budget commission or budget board in counties presently having such a commission or board shall make the apportionment as above provided, in event the apportionment is necessary. (Emphasis supplied.)

The provision is only for authority "to apportion the millage" to be levied for the various entities. To apportion means to divide or allot and, in the absence of a prescribed rule by which the division shall be made, it implies a reasonable discretion to assign in just proportions which are not necessarily equal or prorated by fixed rule. *Stoddard v. Montgomery* 1959, 169 Neb. 252, 98 N.W. 2d 875; *Manhattan General Equipment Co. v. Commissioner of Int. Rev.* 1935, 297 U.S.129, 56 Sup. Ct. 397, 80 L.Ed. 528.

The law contains no language requiring reduction of the millage for each budget by the same percentage, which requirement could easily have been incorporated if that had been the legislative intent. That would, however, have reduced the board's duties under the statute to a clerical function. Instead, the delegation of authority to apportion the millage appears to me, in the context of this law, to contemplate the distribution of the maximum millage in a manner permitting more flexibility in evaluation of the diverse problems involved, subject to standards of reasonable, and not arbitrary, discretion.

The authority of the board under the statute is, of course, limited to an authority to apportion millage. In response to your second question, this statute does not authorize reduction of any "portion of the budget applying to revenue to [officers] whose fees are fixed by statute" rather than by ad valorem tax millage.

070-139—October 7, 1970

#### CONSUMER PROTECTION

#### FLORIDA HOME SOLICITATION SALES ACT— COVERAGE

To: *Lew Brantley, State Representative, Jacksonville*

#### QUESTION:

1. Are only off-premises sales to natural persons included, or does Ch. 70-363, Laws of Florida, encompass sales to a partnership, association or corporation?
2. Does the act apply to off-premises sales to an individual who does not plan to use the goods for personal, family or household purposes?
3. What credit sales fall within the \$25.00 exemption?
4. Are sales solicited by telephone from the seller's place of business covered by the act?

Section 501.021, F. S., of the Home Solicitation Sales Act (Ch. 70-363, Laws of Florida), defines its coverage to include "any consumer credit sale of goods or services . . ." The meaning of the term "consumer" is generally held to mean anyone who uses goods and diminishes their utility or the last person to whom property passes in the course of ownership. This, on its face, may tend to indicate that all ultimate

consumers are covered by this act. However, the words being defined are *home solicitation sales*. In an exhaustive research of the word "home" I have found no authority that would construe this word to include partnerships, associations, or corporations.

Further, I believe that the evil the legislature was seeking to remedy by passage of this act was the subjugation of the common consumer to the pressures of a salesman in the consumer's home and not those sales to commercial enterprises experienced in purchasing. Thus, to answer specifically your first question, it is my opinion that the Home Solicitation Sales Act does not apply to sales made to commercial enterprises such as partnerships, associations, corporations, or the like.

Your second question uses the terms "personal, family or household purposes" which are used to define "consumer goods" in § 679.109(1), F. S. (Uniform Commercial Code). The Uniform Commercial Code treats those goods that are not "consumer goods" as goods used in a business setting (e.g., equipment, farm products, and inventory). Thus, if goods are purchased not within the definition of "consumer goods" they are by necessity commercial in nature and, as in your first question, do not fall within the coverage of the Home Solicitation Sales Act.

I interpret the \$25.00 exemption of § 501.021, F. S., to include all sales under \$25.00, exclusive of tax, interest, mailing charge, carrying charge, or the like.

Your fourth question presents the problem of home solicitation by telephone. Section 501.025, F. S., provides that the buyer's rights arise when "the buyer signs an agreement or offer to purchase..." (Emphasis supplied.) Section 501.031, F. S., provides that the "sale shall be evidenced by a writing.... The seller must obtain from the buyer his signature to a written agreement or offer to purchase...." The solicitation, offer, and acceptance via telephone is necessarily an oral contract. The buyer's rights under the act only exist when there is a signed contract. Therefore, because of physical impossibility, this act does not apply to sales via telephone.

070-140—October 8, 1970

#### TAX COLLECTOR

#### LIABILITY FOR COUNTERFEIT MONEY ACCEPTED IN SALE OF LICENSE PLATES

To: A. P. Ayers, Tax Collector, Naples

#### QUESTION:

Is a county tax collector responsible for loss occasioned by acceptance of a counterfeit twenty dollar bill during the final hours of sale of automobile license plates by his office in August?

In my opinion, an affirmative answer is required. The provision of the statute, § 320.03, F. S., is that "each tax collector shall keep a full and complete record and account of all license plates... received by him..." and that the bond required of him shall be conditioned that he will faithfully perform his duties "and that he will well and truly pay over and account for all license plates..." (Emphasis supplied.)

The obligation stated by the latter language appears to be absolute and unqualified, imposing liability without regard to fault in the disposition of license plates. Cf. *Holland v. Amer. Surety Co. of N.Y.* 1942, 149 Fla. 285, 6 So.2d 280. Liability has been recognized for the acceptance of bad checks in payment of license fees. Attorney General

Opinion 064-91, July 14, 1964, Biennial Report of the Attorney General, 1963-1964, p. 387. Although the circumstances are not clearly analogous, both result in the collector's inability to comply with the statutory duty to account for all license plates, unless, as a practical matter, the right to demand surrender of the license tag can be exercised.

In any event, the question you present must be governed strictly by the statute, and I conclude that your duty of accountability thereunder imposes responsibility for this loss.

070-141—October 8, 1970

#### TAX ASSESSORS

#### INTANGIBLE PROPERTY TAX RETURNS—CARBON OR XEROX COPY OF CORRECTED OR AUDITED RETURN AS NOTICE TO TAXPAYER

To: *James L. Roden, Tax Assessor, Bartow*

#### QUESTIONS:

1. When the original and copy of an intangible property tax return are filed by a taxpayer, can the carbon copy of this return, after being audited, be mailed to the taxpayer as the notice of change of value as required by § 199.121, F. S.?

2. When only the original copy of an intangible personal property tax return is filed by the taxpayer, may a Xerox copy of this return be made after the return has been audited and mailed to the taxpayer to show the change in value?

Both questions may in my opinion be answered in the affirmative. Section 199.101, F. S., states that "no officer examining such return shall divulge their contents . . . or make or permit to be made any copy or list therefrom . . ." This provision is intended to preserve the confidentiality of the tax records. Attorney General Opinion 069-120, of this publication.

Section 199.121, F. S., provides as follows:

... [If] the tax assessor shall, upon his knowledge or after investigation, find that the taxpayer has intangible property subject to taxation which is not described in such return or that the valuation of that which is described in such return is greater than the valuation shown by such return . . . the tax assessor may change the assessment and shall give notice by mail to the person filing the return. . . .

This notice would of necessity contain the information found on the audited return. An audited carbon or Xerox copy sent to the taxpayer filing such return would be a notice for legal purposes and in my opinion would not be—for those purposes—a "copy or list therefrom." The statute states only that the assessor shall "give notice by mail to the person filing the return." I find no prescribed form for such notice and feel that the audited carbon or Xerox copy—used only for notice purposes to the taxpayer filing the return—would not be in violation of § 199.101, F. S. There appears to me to be no sound reason to proscribe that expedient method of notifying the taxpayer of increases in his assessments.

My conclusions above are based on the assumption that the copy of a return used for notice purposes would be clearly marked in some

fashion which would indicate its function as such notice and would serve to differentiate that audited or altered copy from an ordinary copy or duplicate of the original return. I assume also that all necessary precautions will be taken to preserve confidentiality, such as mailing this form of notice in an envelope clearly marked "Personal and Confidential—Not To Be Opened By Other Than Addressee."

070-142—October 8, 1970

#### COUNTY GOVERNMENT

#### REPEAL OF LOCAL LAW BY COUNTY ORDINANCE— CONSTRUCTION OF ART. VIII, § 1(f), STATE CONST.

To: *Robert L. Nabors, County Attorney, Titusville*

#### QUESTION:

May the board of county commissioners of Brevard County, under the provisions of Art. VIII, § 6(d), 1968 State Const., repeal § 3 of Ch. 69-531, Laws of Florida, relating to the compensation of judges of the magistrates court of Brevard County?

A noncharter county's "home rule" legislative authority is limited by Art. VIII, § 1(f), of the 1968 State Const. and the implementing statute, § 125.65, F. S., to the adoption of ordinances that are "not inconsistent with general or special law." A narrow exception to this limitation is found in Art. VIII, § 6(d) of the 1968 State Const., which authorizes the repeal or amendment by county ordinance of "local laws relating only to unincorporated areas of a county on the effective date of this article . . ." (Emphasis supplied.)

The statute in question, Ch. 69-531, Laws of Florida, became a law in July of 1969 to be effective October 1, 1969. The 1968 Revised State Constitution became effective January 7, 1969. It can thus be seen that Ch. 69-531, Laws of Florida, is not a local law that was in existence on the effective date of Art. VIII, § 6(d), State Const., and is thus not within the narrow exception therein provided. In addition, a statute that fixes the compensation of a county official would not appear to be a local law that "relates only to unincorporated areas of a county . . ." Your attention is also directed to Art. II, § 5, 1968 State Const., providing that the compensation of state and county officers shall be fixed *by law*. This would appear, also, to constitute an impediment to the fixing of the compensation of a county officer by county ordinance. For the reasons stated, your question is answered in the negative.

070-143—October 13, 1970

#### CRIMINAL PROCEDURE

#### TRANSFER OF CASES FROM MUNICIPAL COURT TO STATE COURT HAVING JURISDICTION FOR JURY TRIAL—TRANSFER OF SURETY BOND

To: *Clyde L. Heath, Clerk, Court of Record, Fort Lauderdale*

#### QUESTION 1:

The defendant does not sign the petition for transfer, but his attorney does sign it. The defendant's bail bondsman gives



written consent to the transfer of the bail bond to the state court to which the case is transferred. An order of transfer is made. The defendant fails to appear in the state court for jury trial. Does the bondsman have the right to surrender the defendant and, if so, to what court?

The fact that the defendant did not sign the petition for transfer is of no importance, since § 932.61(2), F. S., says that such a petition shall be signed by the defendant or his attorney.

Upon the happening of the above-recited facts, the bail bond became a bond to answer the transferee state court. Therefore, if the state court has not entered an order forfeiting the bond, I think that the surety may arrest the defendant and surrender him pursuant to §§ 903.20 and 903.21, F. S. The order of transfer ended the municipal court's jurisdiction and vested jurisdiction in the state court. If the defendant were not at large on bail at the time of the transfer of the case, § 932.65, F. S., would require that he be transferred to "the jail facilities of the criminal court providing trial by jury", and I think that when he is out on bond, the bondsman who surrenders him under §§ 903.20 and 903.21, F. S., should make the surrender to the same jail facilities.

If the state court has ordered the bond forfeited, § 903.26(6), F. S., empowers that court to order the forfeiture discharged within a stated time upon proper showing that, among other things, the defendant has been surrendered into custody. Such a surrender by the bondsman after the forfeiture of the bond should also be made to the same jail facilities.

#### QUESTION 2:

The defendant signs the petition for transfer and an order of transfer is made. The bail bondsman does not sign a written consent to the transfer of the bond. The defendant fails to appear in the transferee state court. Does the bondsman have the authority to apprehend the defendant and, if so, to whom should he surrender the defendant?

I think that under these facts the bail bondsman has no duty or authority to apprehend the defendant and turn him over to anyone.

Section 932.61(2), F. S., prescribes the contents of a petition for transfer. Section 932.61(3), F. S., says that the judge of the court in which the defendant is charged, upon finding the petition to be correct in all of its allegations of fact, shall order the transfer of the case to the appropriate court having criminal jury trial jurisdiction. Section 932.61(4), F. S., requires the clerk of the transferring court to furnish notice of transfer to the bail bondsman, if any. Section 1, Ch. 70-372, Laws of Florida[§ 932.64, F. S.], provides that:

**932.64 Transfer of surety bond.**—Surety bonds shall, with the written consent of the bondsman, be transferred and made returnable to the court in which trial by jury is provided.

It is optional with the bondsman as to whether he will give written consent to the transfer of the bond. If he does not do so, the results are that the bondsman is under no obligation to produce the defendant before the transferee state court, and by transferring the case to the state court, the municipal court loses jurisdiction to further deal with it and thereby brings to an end the obligation of the bondsman to produce the defendant before the municipal court. This leaves the defendant "footloose and fancy free"; he has no bondsman responsible for seeing to it that he appears in either the transferring court or the transferee court. Section 932.61(2), F. S., requires that the petition for transfer

contain an agreement by the defendant to appear in, answer, and attend, the transferee court, but that agreement places no obligation upon the bondsman.

Since the bondsman has no further obligation after the case is transferred when he fails to give written consent to the transfer of the bond, he is without authority to apprehend the defendant and deliver him to anyone.

#### QUESTION 3:

The defendant files a petition for transfer and the case is transferred. The bondsman declines to give written consent to the transfer of the bond and the defendant is released on his own recognizance. He fails to appear for jury trial in the transferee court. Is the bondsman still liable and does he have authority to apprehend and surrender the defendant?

For the reasons stated in answering question 2, I think that the bondsman is not still liable and that he is without authority to apprehend the defendant and surrender him to anyone.

#### QUESTION 4:

After the case is transferred, the defendant either pleads guilty or pleads not guilty and waives trial by jury. Does the case return to the transferring court?

This question is answered in the negative. When the case was transferred, the transferring court's jurisdictional string was cut and the transferee court acquired sole jurisdiction to dispose of the case, whether by trying it before a jury, trying it without a jury if a jury trial is waived, or accepting a tendered plea of guilty.

#### QUESTION 5:

The defendant's bond is made returnable to a municipal court. The case is transferred to a state court and the bondsman gives written consent to the transfer of the bond. The bond is forfeited in the state court. Is the municipal court or the state court responsible for having judgment entered on the bond?

When the transferee state court has a prosecuting attorney, § 903.27, F. S., makes it his duty to attend to procuring the entry of a judgment upon a bond forfeited in a transferred case if the forfeiture is not paid or discharged within 30 days; if such court has no prosecuting attorney, said statute makes it the duty of the state attorney to perform that service.

#### QUESTION 6:

A case is transferred from a municipal court to a state court. The bondsman does not sign a written consent to the transfer of the bond. Who has authority to cancel the bond and how is the defendant's presence before the state court to be procured?

The state court has no authority over such a bond because it is returnable before a municipal court and the surety does not sign a written consent to the transfer of the bond. In such a situation, only the municipal court could order the bond canceled.

Under the recited circumstances, the transferee state court can issue a *capias* for the arrest of the defendant if he fails to appear before that

court in accordance with law and then release him on a new bond to await trial.

QUESTION 7:

The case is transferred and the bondsman gives his written consent to the transfer of the bond. The bond schedule of the municipal court is different from the bond schedule of the state court. For example, the municipal court's bond schedule calls for a bond in the amount of \$400 for the offense charged but the state court's bond schedule sets the amount at \$500. For further example, the municipal court's bond schedule calls for a \$500 bond while the state court's schedule provides for a \$400 bond for the same offense. Does this difference affect the surety's liability?

The answer is no. The bondsman is liable for the amount of the bond—no more, no less.

If the state court considers that the amount of bail should be increased, it may proceed to raise the amount under Florida Criminal Procedure Rule 1.130(f) or (h).

QUESTION 8:

Section 932.61(4), F. S., provides that the clerk of the transferring court, within 3 days after receipt of the judge's order of transfer, shall transmit specified documents to the clerk of the transferee court. Are Saturdays, Sundays or legal holidays to be counted as a part of such 3 days?

I find no statute or court rule which specifically answers this question. However, I note that the Authors' Comment found in 30 F.S.A., p. 14, says, with respect to the applicability of the Florida Rules of Civil Procedure, that:

Except where they conflict with statutory provisions, the rules may serve as a useful guide for approved procedure even in courts, agencies or proceedings to which not expressly applicable.

Also, one of said Rules of Civil Procedure, Rule 1.090(a), provides that:

In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday or legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday or legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

I find that Florida Rule of Criminal Procedure 1.040 and Florida Appellate Rule 3.18 are to the same effect as the above-quoted Rule of Civil Procedure 1.090(a). Therefore, I think that it would be reasonable and appropriate for the clerk of a transferring court to apply the provisions of said Rule of Civil Procedure 1.090(a) when computing the three days mentioned in § 932.61(4), F. S., as aforesaid, and to exclude Saturdays, Sundays and legal holidays if said rule would require their exclusion in a civil suit.

070-144—October 15, 1970

DIVISION OF PERSONNEL AND RETIREMENT

AUTHORITY OF DIVISION DIRECTOR TO WITHHOLD PAYMENT OF SALARY INCREASE AND TO SUBSTITUTE A LOWER PAY GRADE FOR EMPLOYEE WHEN FUNDS PROVIDED BY 1970 GENERAL APPROPRIATIONS ACT

To: *Richard W. Ervin, Chief Justice, Supreme Court of Florida, Tallahassee*

QUESTIONS:

1. Does Ch. 110, F. S., or any other law authorize the division of personnel and retirement of the department of administration to delay until a later date a salary increase for a specified position, for which funds were expressly provided in the general appropriations act?

2. Does Ch. 110, F. S., or any other law authorize the division of personnel and retirement of the department of administration to substitute a salaried position of a lower pay grade for a position which the legislature included in the general appropriations act and for which funds were specifically allowed therein?

I note that § 216.181(1), F. S., provides that

"On or before July 1, the chairmen of the legislative appropriations committees jointly shall furnish information to the director of planning and budgeting and the auditor general relative to legislative amendments, if any, to the legislative budgets submitted pursuant to § 216.023, F. S. The director of planning and budgeting shall furnish such information to each affected state agency."

Significantly, § 110.022(2)(a), F. S., states:

The powers, duties, and functions of the department shall include the responsibility for the day-to-day administration of all activities of the division of personnel and retirement, which shall include, but not be limited to, approval of the classification of positions, the reclassification of positions, and the establishment and revision of pay-grade assignments.

The legislature in the enactment of the general appropriations act in § 1, Ch. 70-95, Laws of Florida, provided, among other things, for the judicial administrative commission from general revenue, as follows: "Item 614. Salaries, Retirement and S.S. Matching of 5 positions."

The amount appropriated, i.e., \$49,998.00, was amended to exceed the governor's recommendation of salary funds and number of positions for the judicial administrative commission. The note of the chairmen of the legislative appropriations committees advises that such appropriation included as follows: "governor's recommendation plus 1 accountant I new position at \$8,961 and \$1,278 to pay director \$17,000 starting July 1, 1970."

It is fundamental that the intention of the legislature in appropriations acts, as well as other statutes, controls, and the intent must be given effect even though it may appear to contradict the strict letter of the statute and well settled canons of construction. *Smith v. Ryan* 1949, 39 So.2d 281. In construing a statute, the legislative intent will be gleaned from reading the statute, the subject to be regulated, the



purpose to be accomplished, and the means adopted for accomplishing the purpose. State *ex rel.* Cooper v. Coleman 1939, 189 So. 691, 138 Fla. 520.

It has also been recognized that in addition to the language used, the subject matter encompassed, and the purpose designed to be accomplished, all other relevant and proper matters that will assist in ascertaining legislative intent may be considered. American Bakeries Co. v. Haines City 1938, 180 So. 524, 131 Fla. 790.

Statutes should be construed to make them effective to advance and not defeat the object of the state if language permits. State v. Rose 1929, 122 So. 225, 97 Fla. 210.

No literal interpretation should be accorded a statute if it leads to unreasonable conclusion or to a result not intended by the legislature. City of Ft. Lauderdale v. Des Campes 1959, 111 So.2d 693.

Sums appropriated in Item 614 from the general appropriations, i.e., \$49,998.00, when allocated to the five positions recognized in said section, provide compensation for those five positions far in excess of amounts established by the state employee pay plan for that agency. But for the joint comments of the chairmen of the respective appropriations committees relating to Item 614, such an unreasonable result would obtain.

With full recognition of the authority of the secretary of the department of administration in § 216.181(2), F. S., it would appear that the legislative intent as gleaned from the joint committees' notes, *supra*, should be satisfied. The additional funds added to the governor's recommendation for appropriation to the judicial administrative commission must be recognized as including an accountant I new position at \$8,961 and \$1,278 to pay director \$17,000 starting July 1, 1970.

You advise that the division of personnel and retirement of the department of administration suggests withholding department action on this question until January 1, 1971, since it would appear to involve similar requests of other agencies. I note with interest the recent consideration and action taken on salary increase for the executive director of the Florida Citrus Commission. Unlike the matter herein, no explanatory comment of the joint committee chairmen was issued. It is assumed that funds made available to the judicial administrative commission through action of the department of administration are adequate to fund the additional position and director's salary increase, added to the governor's recommendation by the legislature.

It is my opinion the legislative direction should be followed and would control recommendations of the director of the division of personnel and retirement of the department of administration. Whatever steps necessary to be taken by the department of administration or the judicial administrative commission to carry out the legislative intent that the new position and compensation to the director be available to the commission as of July 1, 1970, should immediately be taken.

070-145—October 15, 1970

#### VOCATIONS AND PROFESSIONS

##### BARBERS SANITARY COMMISSION—GOVERNMENTAL REORGANIZATION—AUTHORITY OF DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION RELATIVE TO COMMISSION'S BUSINESS TRANSACTIONS

To: R. A. McDougall, Director, Florida Barbers Sanitary Commission, Tallahassee

## QUESTION:

Does the establishment of the department of professional and occupational regulation under Ch. 69-106, Laws of Florida, generally referred to as the governmental reorganization act, in any way divest the barbers sanitary commission of its power and authority to lease office space?

Section 476.18(1), F. S., states in part: "The [Barbers Sanitary] commission shall maintain its headquarters in Tallahassee, Leon [C]ounty, and at its own expense." This mandate to the commission must necessarily be construed as its authority to lease or otherwise acquire office space. This authority has not been altered, limited or divested by the governmental reorganization act or any other statute. act or any other statute.

Section 20.30(10) and (11), F. S., enacted by Ch. 69-106, Laws of Florida, classified the commission, along with other examining and licensing boards and commissions, within divisions of professions or occupations under the department of professional and occupational regulation by a type 2 transfer.

The type 2 transfer as defined in § 20.06(2), F. S., contains no provision which would divest any board or commission of its leasing authority. Specifically it states, in part:

For any agency assigned a type two transfer, the collection of license fees and other revenues, payroll, procurement, and related administrative functions shall be exercised by the head of the department to which the board is assigned. Any agency assigned by a type two transfer shall independently exercise the other powers, duties, and functions prescribed by law, including but not limited to rule making, licensing, regulation, and enforcement.

A further indication that examining and licensing boards have not been divested of their authority to lease office space appears from a reading of § 20.30(5), F. S., which states:

The bureau of records administration is responsible for the following administrative functions: Issuance of licenses, collection of fees, and maintenance of nonconfidential records of the department. Nothing herein affects the responsibilities prescribed by law of the examining and licensing boards assigned to this department in regard to the maintenance of confidential records.

Again, it appears to be the clear legislative intent that the authority of the department of professional and occupational regulation be limited to the issuance of licenses, collection of fees, and maintenance of nonconfidential records. Even examination, legal, and investigative services may be rendered by the department only upon the specific request of each individual examining and licensing board, pursuant to § 20.30(6), (7), and (8), F. S.

Therefore, based upon the above analysis, there seems little doubt that the Florida barbers sanitary commission, along with other examining and licensing boards similarly situated, have not been divested of their power and authority independently to negotiate and execute lease agreements for office space. Obviously, such independent authority is in no way subject to the approval or scrutiny of the department of professional and occupational regulation or its secretary.

070-146—October 21, 1970

## STATE PERSONNEL

COMPENSATION—AUTHORITY OF DEPARTMENT OF  
ADMINISTRATION RELATIVE TO EMPLOYEES  
IN CAREER SERVICE

To: *W. Samuel Tucker, Jr., Secretary, Department of Administration,  
Tallahassee*

## QUESTION:

In order to insure uniformity in the pay plan, does the department of administration have the authority and the duty to establish uniform pay periods for compensating employees in the career service?

Your question is answered in the affirmative.

As pointed out in your inquiry, Ch. 69-343, Laws of Florida, amended Ch. 110, F. S., to give the department of administration the power and duty for the "establishment and maintenance of a uniform pay plan which shall be applicable to all positions in the career service." [See § 2, Ch. 69-343, Laws of Florida (§ 110.022(1)(b), F. S.). See also § 31(5)(a), Ch. 69-106, Laws of Florida (§ 20.31(5)(a), F. S.), which transfers the old state personnel board to the department of administration.] The definition of a "pay plan" in § 31(4) of the latter act is as follows:

**Pay Plan.** A document which formally describes the philosophy, *methods, procedures* and the salary schedule for compensating employees for work performed. (Emphasis supplied.)

In Webster's Twentieth Century Dictionary the words "procedure" and "method" are defined as follows:

**Procedure.** The act or the manner of proceeding or moving forward; operation; a series of actions . . .

**Method.** Systematic mode or manner of action; suitable or convenient arrangement of separate things or parts . . . regularity . . . an established or systematic order for performing any action. . . .

In view of the above definitions, it is clear that the department of administration is charged with the duty to establish a uniform pay plan and the "mode or manner of action" or a "suitable or convenient arrangement" with regard to disbursing the pay. It also follows from the above statutory language that the intent of the legislature was that such procedures be made uniform.

It should be noted that the legislature, after transferring the state personnel board to the department of Administration in § 31(5) of Ch. 69-106, Laws of Florida (§ 110.022(2)(a), F. S.) stated that:

The powers, duties and functions of the department shall include the responsibility for the day-to-day administration of all activities of the division of personnel and retirement, which shall include, *but not be limited to*, approval of the classification of positions, the reclassification of positions, and the establishment and revision of pay grade assignments. . . . (Emphasis supplied.)

Certain specific actions taken by the department are reviewable by the administration commission (the cabinet), as provided in this sub-

section. While not all actions are so reviewable, it seems that consideration of the views of the administration commission on the vital question of pay periods before a final decision is made would be in consonance with the general tone of Ch. 69-106. The comptroller, also, under § 17.28, F. S., has a role in the determination of pay periods, but it is the conclusion of this office that Chs. 69-343 and 69-106, Laws of Florida, being later acts, would prevail in any statutory conflict as to whether the comptroller or department of administration had final say in the matter.

In view of the three statutory provisions cited above, it is my opinion that the department of administration has both the final power and the duty to establish uniform pay periods for compensating employees in the career service, with review, if desired, by the administration commission as indicated above.

070-147—October 23, 1970

#### ADDITIONAL COUNTY JUDGE—HILLSBOROUGH COUNTY

##### CHAPTER 69-697, LAWS OF FLORIDA—ELECTION—COMMENCEMENT OF TERM OF OFFICE OF FIRST JUDGE

To: *Nick J. Falsone and William C. Brooker, County Judges, Hillsborough County, Tampa*

#### QUESTION:

Under the provision of Ch. 69-697, Laws of Florida, creating an additional office of county judge in Hillsborough County, to the effect that the new county judge should be elected at the general election to be held in November, 1970, and that the first term of the new judge should be coextensive with the present term of the existing county judges, when would a nominee for the office who is unopposed in the general election take office?

In its dissertation on "Officers," Vol. 67 C.J.S., states, as to the beginning of a term of office:

The term of office begins from the time, if any, fixed by law, not necessarily from the date of appointment or qualification. . . . The general rule is that, where no time is fixed by the constitution or statute, the term begins, in the case of elective offices, on the day of election . . . .

You advise that Ch. 69-697, Laws of Florida, provides that the first term of the office here under consideration "shall be coextensive with the present term of the present county judges now in office."

Webster's New Collegiate Dictionary defines the word "coextend" as: "To extend through the same space or time with another." Since the terms of the county judge which are to be used as a measuring stick for the term of the additional county judge have already commenced, then the new term should begin at the earliest possible date after it is officially determined who the new county judge shall be. This would be on the date of the general election in November, and the term would run until the expiration of the terms of the other county judges presently in office. (See generally *In re, Advisory Opinion to Governor* 1919, 82 So. 612; *State v. Amos* 1931, 133 So. 623.)



070-148—October 27, 1970

## CLERKS OF CIRCUIT COURT

FEE FOR DOMESTIC SUPPORT PAYMENTS—§ 28.24(25)  
AND CH. 88, F. S.

To: Charles Tom Henderson, Counsel, Florida Association of Court Clerks, Tallahassee

## QUESTION:

Does the clerk's service charge "for receiving and disbursing domestic support payments," provided by § 28.24(25), F. S., apply to payments received and disbursed pursuant to uniform reciprocal support proceedings?

Reference to the legislative history of § 5 of Ch. 70-134, Laws of Florida (§ 28.24, F. S.), by which this particular service charge was imposed, reveals that, as originally drafted, the proposed enactment (Senate Bill 70) reads as follows:

(24) For receiving and disbursing domestic support payments, per item (Not reciprocal) .50

As finally adopted, this particular provision of the statute (Committee Substitute for Senate Bill 70) reads as follows:

(25) For receiving and disbursing domestic support payments, per item 1.00

The word "domestic" derives from the Latin "domus," meaning "home," and in this context, according to Webster, means "of or relating to the household or the family." Family support payments, whether required by law of this or another state, would thus ordinarily be considered "domestic support payments." It appears that, originally, the legislature intended to exempt from the service charge in question "reciprocal" domestic support payments; and it is inescapable that, by deleting this exemption, the legislature must have intended to impose the service charge on all domestic support payments, including those made pursuant to the uniform reciprocal support proceedings authorized by Ch. 88, F. S. Accordingly, your question is answered in the affirmative.

070-149—October 27, 1970

## CLERKS OF CIRCUIT COURT

FEES FOR RECEIVING AND DISBURSING DOMESTIC SUPPORT  
PAYMENTS—COURT DECREES, RULES OF COURT AND  
§ 28.24, F. S., AS AMENDED BY CH. 70-134,  
LAWS OF FLORIDA

To: W. L. Wadsworth, Presiding Judge, 7th Judicial Circuit, Palatka

## QUESTIONS:

1. Should all final judgments carrying the provision heretofore used in the 7th Judicial Circuit of collection fee of 1% but not less than 50¢ per pay period be amended to reflect the new collection rate of \$1.00 per pay period?

2. If so, will it be necessary to notify the parties of such change in the clerk's fees for the service or can it be done automatically as provided by statute?

The \$1.00 service charge referred to in your question is new to the fee schedule provided by § 28.24, F. S., for clerks of the circuit courts. Added as a new subsection (25) of § 28.24, F. S., by Ch. 70-134, Laws of Florida, it authorizes the clerk to collect \$1.00 "for receiving and disbursing domestic support payments." It is noteworthy that there is no statute that applies *generally* to the circuit courts of this state authorizing the chancellors thereof to require domestic support payments to be made through the circuit court clerks and prescribing the fee to be collected by the clerk for such service. House and Senate bills that would have provided general authority in this respect as to child support payments were introduced in the 1970 session and defeated. (See Senate Bills 386 and 1343, and House Bills 3602 and 4952.)

The uniform reciprocal enforcement of support law, Ch. 88, F. S., authorizes the circuit judges of this state when acting as the responding state to require the defendant "to make at specified intervals to the clerk of the court or obligee such payments as are specified by the Florida court," but does not provide a fee for such service. § 88.231(2), F. S. It appears, also, that the judges of the chancery courts in Escambia County may require alimony and child support payments to be made through the clerk of the court of record of Escambia County as an "official duty" of the clerk, for which a flat fee of 50 cents may be charged. See § 43.141(2), F. S. And several of the judicial circuits of this state have adopted a rule of court authorizing the judges thereof to require domestic support payments to be made through the circuit court clerk, as has the seventh judicial circuit in which you are presently serving. (No opinion is expressed as to the propriety of such a court rule. See Art. II, § 5(c), 1968 State Const.)

The statutory provision in question, § 28.24(25), F. S., does not in terms provide that the "receiving and disbursing of domestic support payments" shall be an official duty of the clerk; and, presumably, the circuit court rules could just as well require some other county official to perform this function. The statute does, however, provide a "service charge" of \$1.00 for the clerk whenever he performs such duty. And there can be little, if any, doubt that the legislature intended that this \$1.00 service charge should supersede the various fees for the same service prescribed by court rule in the several judicial circuits wherein a similar rule has been adopted. In fact, your question assumes as much, the only area of doubt being the impact of the new \$1.00 statutory service charge on decrees entered prior to the effective date of the Act (July 1, 1970).

It is fair to assume that each chancellor, operating under the particular statute or rule applicable in his court, must have taken into consideration the amount of the clerk's service charge in fixing the amount of each payment for domestic support and the frequency—whether weekly, biweekly, or monthly—of the payment; and I have the view that the statute should not be interpreted as having been intended to modify such a decree entered prior to its effective date (July 1, 1970) insofar as the amount awarded therein for the clerk's service charge is concerned. It is a well settled rule of statutory construction that a statute is not to be interpreted as operating retroactively unless such an intent clearly appears from the terms and purpose of the enactment. Acts which create new obligations and impose new penalties are particularly susceptible to this rule of construction. *Larson v. Independent Life and Acc. Ins. Co.*, Fla. 1947, 29 So.2d 448.

The provision in question, § 28.24(25), F. S., creates an obligation that did not exist at the time the decrees awarding domestic support payments entered prior to July 1, 1970, were formulated by the chancellors of this state under the special authority referred to above. In

the absence of anything in the statute clearly indicating that it was intended to have the effect of modifying, to this extent, the decrees theretofore entered, it must be concluded that there was no such legislative intent.

I realize that, as to decrees entered subsequent to July 1, 1970, the imposition of the \$1.00 service charge over and above the amount of the domestic support payment will, in some cases, as for example, a decree awarding a small weekly payment, have an inequitable result; however, as you know, the wisdom and policy of the legislature in adopting a particular statute is not subject to review by the courts nor, *a fortiori*, by this office. I understand that remedial legislation will be introduced at the next session of the legislature. In the meantime, the circuit judges may alleviate the situation somewhat by providing for biweekly or monthly payments when the ratio between the \$1.00 service charge and the amount of the domestic support payment is so disproportionate as to result in an unconscionable charge for the service on a weekly basis.

The answer to your first question makes unnecessary an answer to your second question.

070-150—October 27, 1970

#### MUNICIPAL GOVERNMENT

#### "HOME RULE" POWERS UNDER STATUTES AND CONSTITUTION—§ 167.005, F. S., AND ART. VIII, § 2(b), STATE CONST.—MUNICIPAL PENSION PLANS

To: Alfred T. Airth, City Attorney, Live Oak

#### QUESTION:

May a city establish by "home rule" ordinance a retirement or pension plan to be financed from city tax funds?

You state that the city's charter does not expressly authorize the governing body of the city to establish a pension plan for its employees; and apparently there is no other special act specifically so providing. Thus, your question requires a consideration of general principles of law relating to municipal home rule as well as the constitutional and statutory provisions of this state providing therefor: Article VIII, § 2, State Const., 1968, and § 167.005, F. S.

The general purpose of municipal home rule is, of course, to delegate to municipalities the sovereign power of the state to legislate concerning municipal affairs. It is, however, an essential element of all constitutional provisions establishing the principle of home rule that the state retains the power to legislate by general law in matters of statewide interest and that the power of the municipality to legislate is confined to matters of purely local and municipal concern. See 37 Am.Jur., *Municipal Corporations*, § 106, p. 715.

Florida's constitutional and statutory municipal home rule provisions, Art. VIII, § 2, State Const., and § 167.005, F. S., follow the usual pattern insofar as state legislative control over matters of statewide interest is concerned. But, in addition, they reserve to the state the right to legislate concerning local affairs, as well. See Art. VIII, § 2(a), State Const., providing that a municipal charter may be amended "pursuant to general or special law." (Emphasis supplied.) And the constitutional and statutory delegations of home rule power themselves contain a limitation on the exercise of the power, namely, "except as otherwise provided by law" (Art. VIII, § 2(b), State Const.), and "except when prohibited by general or special law" (§ 167.005, F. S.).

It was pointed out in AGO 069-127 of this publication that a charter act is a "special law" within the intendment of the constitutional and statutory limitations quoted above. Thus, an express prohibition contained in a municipal charter (such as a provision prohibiting the levy of ad valorem taxes by the city, as was the case in the charter considered in AGO 069-127) would require a charter amendment removing the prohibition before a "home rule" ordinance providing for the exercise of the power could be adopted. And, of course, an express prohibition contained in any other special law applicable to a particular municipality, or provided by general law, would stand as a bar to the adoption of an ordinance in conflict therewith.

It is also a general rule of statutory construction that a constitutional or legislative direction as to the manner in which a thing shall be done is, in effect, a prohibition against its being performed in any other way. See *Murphy v. Barnes*, Fla. 1888, 3 So. 433; *State v. Yeats*, Fla. 1917, 77 So. 262; *Alsop v. Pierce*, Fla. 1944, 19 So.2d 799; Also see *Luers v. Kuykendall*, Fla. 1938, 185 So. 448, in which the court said that "when the legislative charter provides that the municipality must pursue a certain course in regard to matters attempted to be provided for by the charter the municipal legislative authority may not proceed otherwise."

This rule of statutory construction could well have been the basis for the legislative interpretation of the constitutional limitation referred to above, namely, the substitution of the words "except as *prohibited*" by law for the words "except as otherwise provided by law" as used in the Constitution. (Emphasis supplied.) Just as an express prohibition against local legislative action has the effect of declaring that the matter is of statewide concern and preempts the field for state action, so a legislative direction as to the manner in which a particular public function or purpose shall be performed may indicate just as clearly that paramount state concern will not tolerate further local action in the matter.

I have the view, therefore, that a legislative direction by general or special act, including a special charter act, as to the manner in which a particular municipal function or purpose is to be performed, is ordinarily to be interpreted as a prohibition against its being performed in a different manner; and that such a legislative direction cannot be superseded by a "home rule" ordinance in conflict therewith. When, however, a general or special law provides an alternative method of accomplishing a municipal purpose and merely authorizes a city to proceed in accordance therewith, such *permissive* legislative authority would not be within the rule of statutory construction referred to above.

Insofar as your particular "home rule" problem is concerned, it appears that there are several general laws that are relevant to the question here presented. Thus, Ch. 70-112, Laws of Florida (the Florida Retirement System Act), (Ch. 121, F. S.), consolidates all existing statutory pension plans for state and county officers and employees into one comprehensive system that is compulsory for all who are employed on or after December 1, 1970, but elective for existing officers and employees. A municipality may elect to participate in the Florida retirement system established by this act. If it does so after a referendum, municipal employees who are presently covered by a municipal pension plan existing under a special law or municipal ordinance may elect to continue under the old system or to participate in the new system. However, once a city has been accepted as a participant in the state retirement system, all future municipal employees (except, perhaps, municipal firemen and policemen covered by pension plans adopted



under Ch. 175 and 185, F. S., respectively. See § 2(34) of Ch. 70-112, Laws of Florida (§ 121.021(34), F. S.) "shall be compulsory members of the Florida retirement system." Section 5(2)(b)2., Ch. 70-112, Laws of Florida (§ 121.051(2)(b)2., F. S.).

The real issue here, then, is whether, in adopting a comprehensive retirement system program that is compulsory for future state and county officers and employees but is merely optional with municipalities, the legislature intended to prohibit a municipality from setting up its own independent system by "home rule" ordinance. I do not conceive this to be the legislative intent.

Municipal pension plans have traditionally been established by special act or by municipal ordinance pursuant to special legislative authority. See *State ex rel. Holton v. City of Tampa*, Fla. 1934, 159 So.292; *Voorhees v. City of Miami*, Fla. 1940, 199 So. 313, 316. And under the express terms of Ch. 70-112, Laws of Florida, these local pension plans are to continue in full force and effect as to all present and future municipal officers and employees unless the city, after a referendum, elects to participate in the new state system. This provision negates a legislative intent to have a uniform pension plan applicable statewide on a compulsory basis to all municipal as well as to all state and county officers and employees. And it seems to me that the legislature could adopt special legislation establishing a municipal pension plan for the City of Live Oak without doing violence to the apparent purpose and intent of Ch. 70-112, Laws of Florida (Ch. 121, F. S.) By the same token, such a local plan could be adopted by municipal "home rule" ordinance without thwarting the legislative intent. There is nothing in Ch. 70-112 that expressly prohibits a municipality from adopting any pension system other than that therein prescribed; and, in my opinion, the provisions making it optional for a city to participate therein are clearly not within the rule referred to above so as to constitute an implied prohibition against the city's adopting any other plan.

However, Ch. 70-112, Laws of Florida (Ch. 121, F. S.), is not the only general law relating to municipal pension plans. Chapters 175 and 185, F. S., establishing uniform retirement systems for municipal firemen and policemen, respectively, have been in effect for a good many years. The statutes declare that it is "a proper and legitimate state purpose to provide a uniform retirement system" for the benefit of municipal firemen and policemen. See §§ 175.021 and 185.01, F. S. These statewide general laws have, in effect, preempted the field concerning pension plans for municipal firemen and policemen. A municipality could not, in the exercise of its home rule powers, adopt an ordinance contrary thereto. However, provision could be made for firemen and policemen to elect to come under the new municipal pension plan, as was done in Ch. 70-112. (See §§ 2(34) and 5(2)(b)2. of the act (§ § 121.021(34) and 121.051(2)(b)2., F. S.)

Section 165.25, F. S. (adopted by Ch. 19247, Laws of Florida, 1939), should not be overlooked. It constitutes a legislative direction to all municipalities in the state to provide a pension for elective city officials who have held office for twenty or more years, consecutively. This provision could not, of course, be changed by a municipal ordinance establishing a pension plan. However, here, again, it would seem that provision could be made for such officials to elect to take the pension provided by the municipal pension plan. Subject to the foregoing comments, your question is answered in the affirmative.

070-151—October 27, 1970

## TAXATION—SALES AND USE

## SHOPPING CENTERS—TAXABILITY OF RENTALS

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

## QUESTION:

Do payments for merchants' association dues and advertising, pursuant to a lessor's requirements in a lease of space in a shopping center, constitute taxable rentals within the purview of § 212.031, F. S.?

As to leases with the provisions of the sample lease enclosed with your letter, the question is answered in the affirmative.

Section 212.031(1)(a), F. S., provides as follows:

It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, or letting any real property unless such property is:

1. Assessed as agricultural property . . . .
2. Used exclusively as dwelling units . . . .
3. Property subject to transient rental tax . . . .
4. Property subject to tax on parking, docking or storage spaces . . . .

Section 212.031(1)(c), F. S. provides:

For the exercise of such privilege a tax is levied in the amount equal to four per cent of and on the total rent charged for such real property by the person charging or collecting the rental. (Emphasis supplied.)

Under the usual principles of construction applicable to such lease provisions, not all payments which by the terms of the lease a tenant is bound to make are included within the term "rent." It is generally held that the term does not include the obligation to perform collateral contracts. Largely the matter must be determined by a fair construction of the contract. *Korn et al. v. Johnson et al.*, 117 S.W. 2d 844, text 845 (C.C.A. Texas 1938). A court is not always bound by the label which the parties applied to the payment and may examine the true nature of the transaction. *Prudential Westchester Corp. v. Tomasino*, 172 N.Y.S. 2d 652 (Sup. Ct., App. Div.). Although parties may not designate a payment as rent, if the character of the payment has the qualities of rent the courts will construe the payment as such. *Ocean Grove Camp Meeting Ass'n v. Sanders*, 67 N.J.L. 1, 50 Atl. 449; *Munson v. County of Menominee* 1963, 371 Mich. 504, 124 N.W. 2d 246, text 250.

The general rule, however, is that the parties' intent, reasonably and lawfully expressed, should be respected. The Texas Court of Civil Appeals in *Korn et al. v. Johnson et al.* 1938, 117 S.W. 2d 844, text 845 stated standards for interpreting payments as follows:

Where it is stipulated in the contract that such payments are to be treated as a part of the rent . . . the interpretation of the contract involves no difficulty. In such cases the charge is part of the rent.

This conclusion is supported by the opinion in the case of *Allbaugh v. United States* 1950, 184 F.2d 109, text 112 (8th Cir.). There, the court noted:

[Since] the language of the leases . . . clearly made the [payment] a part of the rental . . . we are unable to accept appellant's contention that the lessee's obligation was only a . . . [separate] covenant.

In the sample lease enclosed with your letter, section 8 declares as to "all payments to be made by lessee" that such "shall be deemed to be and shall become additional rent hereunder, whether or not the same be designated as such . . . ." Although such language is not essential to characterize payments as rent, it clearly expresses the intent of the parties and supports a determination that the fees are rent.

For the reasons stated, such payments as merchants' association dues and advertising payments under leases containing the provision above-quoted should be regarded as rent and subject to taxation.

070-152—October 27, 1970

### COURTS

#### COSTS—PAYMENT WHEN DEFENDANT DECLARED INSOLVENT—NO DISCHARGE OR APPEAL

To: John B. Dunkle, Clerk, Circuit Court, West Palm Beach

#### QUESTION:

When a defendant in a criminal case pending in a circuit court or a criminal court of record has not been discharged and has not taken an appeal and obtained a reversal, and where such defendant has been adjudged insolvent pursuant to § 939.15, F. S., does said statute require the county to pay the costs of the case?

Section 939.15, F. S., reads as follows:

**939.15 Costs paid by county in cases of insolvency.**— *When the defendant in any criminal case pending in any circuit or criminal court or the supreme court of this state has been adjudged insolvent by the circuit judge or the judge of the criminal court, upon affidavit and proof as required by § 924.17 in cases of appeal, or when the defendant is discharged or the judgment reversed, the costs allowed by law shall be paid by the county in which the crime was committed, upon presentation to the county commissioners of a certified copy of the judgment of the court against such county for such costs. (Emphasis supplied.)*

According to its terms, this statute applies to a criminal case pending in a circuit court or a criminal court of record when the circuit judge or judge of the criminal court of record adjudges the defendant insolvent or when the defendant is discharged or when the judgment is reversed on appeal.

It is true that this statute speaks of the defendant being adjudged insolvent *upon affidavit and proof as required by § 924.17, F. S., in cases on appeal*, and that said section prescribes the proof to be required of an appealing defendant before he can be adjudged insolvent for appeal purposes. However, the quoted words in § 939.15, F. S., merely prescribe the kind of proof to be presented to a circuit judge or judge of a criminal court of record as a predicate for the entry of an order of insolvency which will place upon the county the burden of paying the costs in the case. These quoted words do not require the taking of an appeal in order to activate the statute when the defendant is convicted instead of being discharged.

The foregoing construction of § 939.15, F. S., is supported by the fact that it was originally enacted in 1895 in order to implement Art. XVI, § 9, State Const. of 1885, which was approved by the voters in 1894, and which provided, in pertinent part:

In all criminal cases prosecuted in the name of the State when the defendant is *insolvent or discharged*, the legal costs and expenses, including the fees of officers, shall be paid by the counties where the crime is committed, *under such regulations as shall be prescribed by law* . . . . (Emphasis supplied.)

Said constitutional provision required the county to pay the costs when the defendant was insolvent or discharged, and the legislature adopted what is now § 939.15, F. S., in order to prescribe by law the regulations governing such payment.

Your letter refers to § 939.01, F. S., which provides as follows:

§ 939.01 Judgment for costs on conviction.—In all cases of conviction for crime the costs of prosecution shall be included and entered up in the judgment rendered against the convicted person.

Despite § 939.01, F. S., § 939.15, F. S., controls the situations with which it deals because it is the later enactment, and it may be regarded as an exception to § 939.01, F. S. In conclusion, it is my opinion that your question is properly answered in the affirmative.

070-153—October 27, 1970

#### PUBLIC BUSINESS

#### IMMUNITY FROM TAXATION—POWER TO CONTRACT— PUBLIC EMPLOYEES

To: Frank B. Watson, City Attorney, Fort Myers

#### QUESTIONS:

1. Are city employees who use their own automobiles for city business entitled to exemption from the Florida state sales tax and the federal excise tax in the purchase of tires for those automobiles?
2. Can the city purchasing department secure for said employees tires for said automobiles under state contract price procedures?

The answer to both questions is in the negative. From the facts shown in your enclosure, the city employees would be required to sign "an exemption form which every tire dealer has, exempting them from federal excise tax and Florida state sales tax. Also, they are to sign a statement that their car is used 50% or more for city business." It is further noted that the city pays said employees a car allowance.

#### AS TO QUESTION 1:

The federal excise tax mentioned is the manufacturers' excise tax provided in 26 U.S.C.A. § 4071. Title 26, § 4221 U.S.C.A. provides for the contemplated exemption as follows:

(a) General Rule.—Under regulations prescribed by the Secretary or his delegate, no tax shall be imposed under this chapter on the sale by the manufacturer of an article . . . .

(4) [T]o a state or local government *for the exclusive use of a state or local government*. . . . (Emphasis supplied.)



Such language clearly precludes the qualification for exemption of any privately owned and privately used automobile.

The Florida sales tax is inapplicable to municipalities per § 212.08(6), F. S., which states:

There shall also be exempt from the tax imposed by this chapter sales made to . . . any . . . municipality or political subdivision of the state . . . .

A situation that is analogous to the facts in your letter provides precedent for my negative conclusion. Gasoline excise taxes have been deemed applicable to a rural mail carrier who, like these city employees, furnished his own automobile to deliver the mail and was given a small travel allowance. In deeming the gas tax applicable, the court noted the following in *Tirrell v. Johnston*, 171 A.641, 650-651 (N.H. 1934). Aff'd 293 U.S. 533, 79 L.Ed. 641:

The plaintiff, in his capacity of purchaser of automobile fuel, stands like any other individual. He has not even been a purchaser intending to use the fuel solely in the performance of his official duties . . . . [H]e uses his car for private driving as well as in the delivery of mail. . . .

A conclusion of immunity from this charge could be sustained only by saying that such increased cost of operation to the carrier will have the effect of requiring the federal government to increase in the future the salary or allowance of its carrier. . . .

Where the sale is not to the government, but to some agency required by law to furnish the purchased article at his own expense, there should be no exemptions.

[T]here was no sale to the government. The article purchased never became property of the government. It was the plaintiff's property, which he was at liberty to use as he saw fit. The procurement was his affair. It was immaterial to the government whether he paid a large or small price for it, or whether he procured it as a free gift. . . .

The analogy between this case and the facts in your letter is easily drawn. One may also note the conclusion of the United States Supreme Court in *Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279, 283 (1931). There, it was stated:

Property which has . . . passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it . . . in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction.

In view of the above laws and cases, it does not seem that the city employees could qualify for the exemptions.

#### AS TO QUESTION 2:

The state tax exemption is, of course, related directly to the power of the municipality to purchase the tires under state contracts. This power is granted by § 125.081, F. S.:

. . . [A]ny municipality . . . having the power to make purchases from public funds may, after complying with *all laws limiting, restricting or defining the manner or means of making*

such purchase, make any purchase of any goods, supplies or materials under any state contract (if the terms of such contract permit) established by the state or any department or board or commission thereof, when the state contract price for such goods, supplies or materials is in each case lower and better than any bid received or offer made for the sale of such goods, supplies or materials and the purchase of such goods, supplies or materials at said contract price is herewith authorized and determined to be for a state purpose. (Emphasis supplied.)

The above-mentioned "laws limiting, restricting or defining" are encompassed in the constitutional and statutory provisions creating municipalities and conferring general powers upon them. Article VIII, § 2(b) of the 1968 State Const., reads:

Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

This section is reiterated in § 167.005, F. S.

The question of the breadth of these powers is dependent upon the facts of each case, but a general standard is that "when a municipality undertakes to exercise powers of a business nature as distinguished from governmental . . . the authority for such exercise should clearly appear by express provision or by reasonably certain implication from other powers conferred, and should be in entire consonance with the purposes for which the municipality was created. . . ." *So. Utilities Co. v. City of Palatka* 1923, 99 So. 236, 243.

In order to be consonant "with the purposes for which the municipality was created" the power should be to effect a municipal purpose. The proprietary power of the municipality as dealt with in the contract purchasing statute would seem unrelated to *municipal* purposes when such ownership benefits are extended to private individuals who are already given an allowance as compensation for the public use of their private property.

Since the employees cannot qualify for the exemption, and since the proprietary powers of the municipality do not clearly extend to procurement of tires for privately owned automobiles, the answer to both questions is in the negative.

070-154—October 28, 1970

#### TAXATION

##### HOMESTEAD EXEMPTION—DIVORCED OWNERS

To: *James W. Bass, Tax Assessor, Fort Pierce*

#### QUESTIONS:

1. When a husband and wife owning a home as an estate by the entirety are divorced and the wife continues to live in the home, is she entitled to claim a \$5,000 homestead exemption or only \$2500 for the one half interest she owns?

2. Would your answer be different if the divorce decree provided that the wife is to have the use of the home and the husband is to take care of the monthly mortgage payments, insurance, and taxes and for the support of the minor children?

## AS TO QUESTION 1:

On the facts given, assuming that the divorced wife pays the taxes and is otherwise eligible to claim homestead tax exemption, she is entitled to the \$5,000 exemption unless the assessed value of her interest is less than that amount.

Article VII, § 6 of the State Const., provides exemption from taxation to "every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner." Clarification and statutory implementations of this constitutional mandate are found in § 196.031, F. S., which provides for apportionment of the exemption as follows: "... said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear . . ." (Emphasis supplied.) The amount of the exemption is to be "the value of the real estate assessable to the owner" (Art. VII, § 6(b), State Const.) "up to the assessed valuation of five thousand dollars . . ." (Art. VII, § 6(a), State Const.).

The interest assessable "may be held by legal or equitable title, by the entireties . . . [or] in common . . ." (Art. VII, § 6(a) State Const.). The husband and wife, upon divorce, are vested with the title as tenants in common. Section 689.15, F. S., provides: "... in cases of estates by entirety, the tenants, upon divorce, shall become tenants in common." Even when the divorce decree makes no mention of property held by entireties as husband and wife, as soon as the decree becomes effective the parties become tenants in common by operation of law. *Powell v. Metz*, 55 So.2d 915 (Fla. 1952). The interests of tenants in common are separate property interests (AGO 063-29, Mar. 13, 1963, Biennial Report of the Attorney General, 1963-1964, p. 43), subject to separate taxes (AGO 055-319, Dec. 5, 1955, Biennial Report of the Attorney General, 1955-1956, p. 411). Each is assessable as the whole of an undivided one half interest. Attorney General Opinion 063-29 mentioned above. If such interest is assessed up to \$5,000, the exemption corresponds to the assessment and is equivalent to the value of the interest.

Because the statute allows apportionment of homestead exemption only among such owners as reside thereon, the wife is the only recognizable claimant. Her exemption is allowed for the value of her undivided one half interest in the whole, not to exceed, however, \$5,000.

## AS TO QUESTION 2:

If the former husband pays the taxes, the divorced wife has no apparent right to claim the exemption. As the owner responsible for taxes, the husband is the only person, if any, entitled to the exemption.

You state in this instance that the husband supplies support payments for minor children. These children may be classified as his dependents. *Osceola Fertilizer Co. v. Sauls* 1929, 123 So. 780. Determination of dependency is a fact question which must be decided in view of the circumstances in each case, and the fact that support payments are made does not, in and of itself, establish the dependent status of the children. *Vandiver v. Vincent*, 139 So.2d 704, 709-710 (2d D.C.A. Fla. 1962). In *Re Kionka's Estate*, 113 So.2d 603 (2d D.C.A. Fla. 1959) contains standards which are most often used to determine the dependent status. The pertinent passage in the case reads as follows: "The relationship should be one in which an established and continuing personal authority, responsibility and obligation actually rests upon one . . . for the welfare of others." *Id.*, at 606. (Emphasis supplied.)

If the husband is deemed the person upon whom the children are dependent, he may be considered the head of a family for purposes of homestead exemption. No apportionment appears to be in question, since the husband is responsible for all tax liabilities on the property.

The purpose of homestead provisions is expressed in 11 Fla. Law and Practice *Homestead Exemption*, § 4 to be generally as follows:

Homestead laws are founded upon considerations of public policy . . . . The homestead exemption is designed to benefit not only the head of the household, but also the family, and to protect the family home. . . .

Our courts have always held that homestead laws should be construed liberally in the interest of the family and in favor of the person entitled to them. To grant the husband the exemption in this instance is simply to allow him to be benefited by the exemption designed to make his support of his family less onerous. In *Osceola Fertilizer Co. v. Sauls*, 123 So. 780 (Fla. 1929), the judge noted:

Though a man be divorced from his wife, and she entrusted by the decree with the custody of the children and possession of the home, his status as head of a family is not lost nor his obligations to his children terminated, and his right to a homestead remains.

Thus, if there are minor children whom the husband supports, and if he pays taxes on the homestead property, he is entitled to an exemption up to the value of his assessed interest, not to exceed \$5,000. (Article VII, § 6, State Const. His interest, like his wife's, is that of a tenant in common. § 689.15, F. S.) The exemption should be granted according to the valuation of his undivided one half interest in the whole.

070-155—October 28, 1970

OFFICERS AND EMPLOYEES OF GOVERNMENTAL ENTITIES  
STANDARDS OF CONDUCT LAW—APPLICABILITY TO MEMBERS  
OF ADVISORY BOARDS—§ § 112.311-112.318, F. S.

To: Joan Odell, County Attorney, West Palm Beach

QUESTIONS:

1. Do the state standards of conduct apply to members of county boards, who are appointed by county commissions to serve in an advisory capacity only?
2. In selecting county board appointees, does the board of county commissioners have any responsibility to determine if the appointees are free from conflicts of interest?
3. Is it a conflict of interest for the board of county commissioners to place county funds in a bank in which a member of the local legislative delegation holds a controlling interest?

AS TO QUESTION 1:

The Standards of Conduct Law, § § 112.311-112.318, F. S., applies to officers and employees of "a state agency or of a county, city, or other political subdivision of the state . . ." Strictly speaking, a member of an autonomous advisory board that is not subject to the supervision or control of the board of county commissioners would not be an employee of the board, as that term is generally defined, even though



appointed to the position by that governing body. And it may be that a member of such an advisory board would not be considered an officer of the county, since we generally think of a county official as one who is invested with more than *advisory* functions and responsibilities. See Article II, § 5 of the 1968 State Const., expressly excepting members of statutory bodies having only advisory powers from the dual-office prohibition therein prescribed.

One of the cardinal rules of statutory construction is that a statute should be interpreted in the light of the purpose for which it was enacted. At common law, public officers and employees were prohibited from using their official position for private gain, as a matter of public policy. See *City of Miami v. Benson*, Fla. 1953, 63 So.2d 917, 921, citing 73 C.J.S., *Municipal Corporations*, § 1258, p. 988.

The Standards of Conduct Law is declaratory of the common-law rule in this respect. See *City of Coral Gables v. Weksler*, Fla. App. 1964, 164 So.2d 260, 263. In *City of Miami v. Benson* 1953, *supra*, 63 So.2d 917, in construing a similar statute (§ 839.07, F. S.) declaratory of this same common-law rule, the court held that the purchase of municipal bonds by a bond trustee, employed by the city to advise and assist it in preparing the bond prospectus, was contrary not only to the common-law public policy but also to the statute declaratory thereof. Noting that it had frequently held that the word "officer" when used in this context "includes employees, advisors, and agents of the officers." (Emphasis supplied.) The court squarely held that the "bond trustees were not officers but they are included within the prohibition of the statute." 63 So.2d p. 921.

The decision in the *City of Miami* case, *supra*, is in accord with another rule of statutory construction that appears to be applicable here, namely, that a remedial statute enacted for the public benefit, even though providing a penalty for its violation, is to be liberally construed "most favorably to the public." *Board of Public Instruction of Broward Co. v. Doran*, Fla. 1969, 224 So.2d 693.

It is noteworthy also that, in stating its intent in adopting the law, the legislature declared that it was to serve as "a guide for official conduct of *public servants* in this state. . . ." (Emphasis supplied.) And in *City of Coral Gables v. Weksler*, *supra*, the court said that

The conflict of interest theory is based, as we understand it, on the fact that an individual occupying a public *position* uses the trust imposed in him and the position he occupies to further his own personal gain. It is the influence he exerts in his official *position* to gain personally in spite of his official trust which is the evil the law seeks to eradicate. (Emphasis supplied.)

It seems to me that, as a matter of public policy, when a person is serving in a position of public trust as a member of a county board or commission that is invested by statute with official powers, duties, functions or responsibilities, even though advisory in nature, such a public servant should be expected to comply with the same high standards of conduct that are required of those who are technically "officials" or "employees" of the county. And I have the view that, in the light of the rules of statutory construction and the decisions referred to above, the Standards of Conduct Law should be so interpreted.

It is true that an advisory board or commission would not ordinarily have the power to enter into contracts or exercise any governmental or other powers on behalf of the county, so that the "business transactions" prohibition of § 112.314(1), F. S., of the law would not ordinarily apply to a member of such a board. But it seems

to me that he should comply with the other applicable standards of conduct prescribed by the law. Your first question is answered accordingly.

In view of the statement made in your letter concerning the limited number of persons in professional occupations that are available for appointment to advisory boards, it should perhaps be noted that the statute does not prohibit a public official from following a pursuit or engaging in employment that "does not interfere with the full and faithful discharge . . . of his duties . . ." § 112.316, F. S. For example, many statutory licensing boards are required to have a certain number of members from the industry which is being regulated or licensed. As noted in Attorney General's Opinion SC67-15, this kind of private employment does not violate the Standards of Conduct Law, since the legislature has determined that membership in the industry being regulated "is not only not detrimental to the public pursuits of the Board, but of such an aid in these pursuits as to be a prerequisite to holding Board Office." Speaking on the general question of the private interest that will disqualify a public official, the Supreme Court of New Jersey, in *Van Italie v. Franklin Lakes*, N.J. 1958, 146 A.2d 111, made this well-considered statement:

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. But in so doing, they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "Universal distrust, creates universal incompetency." *Graham v. U.S.* 1913, 231 U.S. 474, 480; 34 Sup. Ct. 148, 151; 58 L.Ed. 319.

#### AS TO QUESTION 2:

I find nothing in the Standards of Conduct Law that requires the governor or a board of county commissioners or any other appointing power to investigate the background of a prospective officer or employee to determine if there is any possibility, immediate or future, direct or indirect, of a substantial conflict between the private employment or other interests of the prospective officer or employee and the public interest. The statute is directed to the official or the employee himself and not to the appointing power. It prescribes a standard of conduct to which such officer or employee shall subscribe in the exercise of his public powers and duties. In these circumstances, I can only suggest that the board of county commissioners use the same reasonable care in exercising its appointing power as in performing any other official duty. Your second question is answered accordingly.

#### AS TO QUESTION 3:

It was noted in Attorney General's Opinion SC70-2 that the designation of a bank as a county depository under the provisions of Ch. 136, F. S., qualifies it for the deposit of public funds even though a member of the board or commission making such deposit is an officer,

director or stockholder in such bank. However, if by "a member of the local legislative delegation" you refer to a state legislator, you are advised that I find nothing in the Standards of Conduct Law that could be construed as prohibiting the board from depositing county funds in a bank in which a local legislator holds a controlling interest.

070-156—October 30, 1970

### CRIMINAL LAW

#### VIOLATIONS OF COUNTY OR MUNICIPAL ORDINANCES— TRANSFER OF CASE FOR TRIAL BY JURY—TIME FOR FILING INFORMATION

To: E. J. Salcines, County Solicitor, Tampa

#### QUESTIONS:

1. When a defendant is charged with a violation of a municipal ordinance and said charge also constitutes a violation of state law, and the provisions of §§ 932.61-932.66, F. S., are applied, may a direct information filed more than 30 days after receipt of the petition for transfer properly be dismissed under § 932.63, F. S.?

2. Is a dismissal as contemplated in § 932.63, F. S., a dismissal with prejudice, precluding the filing of a direct information at any time?

Chapter 70-372, Laws of Florida, added §§ 932.61-932.66 to Ch. 932, F. S., in order to authorize, and establish procedures relating to, the transfer of certain cases for trial by jury. Section 932.61, F. S., prescribes the kinds of cases which may thus be transferred, as follows:

**932.61 Transfer of county or municipal charge to court providing trial by jury.**—A person charged in a court with a violation of a county or municipal ordinance for which no jury trial is provided may, when the violation of a county or municipal ordinance is also a violation of a state law, cause the transfer of the violation to the appropriate court in which a trial by jury is provided . . . .

Section 932.61(1), F. S., provides for the filing of a petition for transfer with the court in which the charge is docketed and pending. Section 932.61(3), F. S., provides for the making of an order of transfer by the judge of the court in which the person is charged. Section 932.61(4), F. S., says, in pertinent part:

(4) The clerk of the court not providing trial by jury, upon receipt of the judge's order directing transfer, shall within three days transmit to the clerk of the court providing criminal jury trial jurisdiction *all the original record materials, including bond and the petition to transfer*, filed in the petitioner's cause, certifying that they are all the original papers filed in the cause and kept by the clerk. The clerk of the court not providing trial by jury shall also transmit copies of all the record materials to the prosecuting attorney of the court providing jury trial jurisdiction to which defendant's cause is being transferred. . . . (Emphasis supplied.)

Section 932.63, F. S., provides that:

**932.63 Filing of charges; petitioner not incarcerated.**—If the petitioner, is not incarcerated, *the prosecuting attorney*

*shall, within thirty days of receipt of the petition, after due and diligent consideration and investigation of defendant's cause, file charges on behalf of the state against the defendant in the court providing criminal jury trial jurisdiction, or shall decline to file charges against the defendant, and the cause shall be dismissed upon the filing of a no true bill by the prosecuting attorney with the clerk. Upon failure of the prosecuting attorney to take action within thirty days, the cause shall be dismissed by the clerk of the court in which the cause is pending.* (Emphasis supplied.)

It is noted that § 932.61(4), F. S., requires that, after receiving the judge's order of transfer, the clerk of the transferring court shall transmit to the clerk of the transferee court "all the original record materials, including . . . the petition to transfer," and also requires him to transmit copies of the same to the prosecuting attorney of the transferee court. It is this copy of the petition to transfer that is referred to by § 932.63, F. S., when it requires the prosecuting attorney of the transferee court to take action "within thirty days of receipt of the petition." It is the prosecuting attorney's receipt of a copy of the petition to transfer from the clerk of the transferring court that gives such prosecuting attorney official notice of the transfer of the case to his court and puts him on notice that he is required to take action within 30 days thereafter.

What constitutes the "cause" which the last sentence of § 932.63, F. S., requires the clerk of the transferee court to dismiss if the prosecuting attorney fails to take action within such 30 days? Since such a dismissal is for the reason that the prosecuting attorney has failed to take action by filing either a charge (by information in some courts; by affidavit in others) or a "no true bill," there is no charge of violating a state law that can be dismissed. Therefore, the "cause" that is dismissed by the clerk is the cause made in the transferring court (for violating an ordinance, not a state law) and transferred to the transferee state court. There is no other "cause" in existence, no charge of violating state law having been filed in the state court. The last sentence of § 932.63, F. S., does not authorize the clerk to dismiss an information or charging affidavit, no matter when filed in the transferee state court; only the said court can do that, and it cannot properly do so on the ground that the information or affidavit was not filed within said 30-day period.

A transfer pursuant to the provisions of said statutes is not a prerequisite to the filing of an information or charging affidavit, as the case may be, in the proper state trial court to charge the commission of a state crime. The only requirement of the law as to the time within which such an information or affidavit may be filed is the statute of limitations, § 915.03, F. S., which requires that a prosecution for a noncapital crime be commenced within two years after the commission thereof.

True, if the clerk dismisses the "cause" pursuant to the last sentence of § 932.63, F. S., the defendant is released from obligation to answer and attend the transferee court which § 932.61(2), F. S., requires him to assume in his petition for transfer. True, also, if the sureties on the defendant's appearance bond have agreed to a transfer of the bond to the state court pursuant to § 932.64, F. S., an order dismissing the "cause" pursuant to the last sentence of § 932.63, F. S., releases such sureties from further obligation on such bond. However, none of this affects the prosecuting attorney's right to file an information or charging affidavit, as the case may be, after the expiration of 30 days following



his receipt of a copy of the petition to transfer, and to obtain jurisdiction of the defendant by having a *capias* or warrant, as the case may be, served on him. In conclusion, both of your questions are answered in the negative.

070-157—October 30, 1970

# PUBLIC OFFICERS AND EMPLOYEES

## DISQUALIFICATION OF PARDONED CONVICTED FELON FOR EMPLOYMENT AS POLICE OFFICER— CONSTRUCTION OF § 23.068, F. S.

To: Jack Ledden, Executive Director, Police Standards Council, Tallahassee

### QUESTIONS:

1. Is a person who has been convicted of a felony eligible for employment as a police officer under § 23.068(4), F. S.?
2. What effect does a pardon have on a conviction?

Chapter 23, part IV, F. S., creates the police standards council and applies to those persons "employed full time by any municipality, this state or any political subdivision thereof, and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state." (§ 23.061(1), F. S.).

Section 23.068(4), F. S., provides that "any person employed as a police officer shall . . . not have been convicted of a felony or of a misdemeanor involving 'moral turpitude' . . ."

In ascertaining the legislative intent in enacting § 23.068(4), F. S., it must be recognized that where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no necessity for resorting to the rules of statutory interpretation, *Wagner v. Botts*, 88 So.2d 611 (Fla. 1956); the plain and obvious provisions must control. In short, if the language of the statute is clear and admits of only one meaning, the legislature should be held to have intended what it has plainly expressed (30 Fla. Jur. *Statutes*, § 74).

The question which logically follows from this is: Does a pardon obliterate or dissolve a conviction so that a person can satisfy § 23.068(4), F. S.?

Essentially, a pardon serves to redeem a conviction by removing the consequences thereof and restoring civil rights; but it necessarily implies guilt since the very essence of a pardon is forgiveness or remission of a penalty. A pardon does not obliterate the fact of the commission of a crime and the conviction thereof. 67 C.J.S. *Pardons*, § 11; *State v. Snyder*, 187 So. 381 (Fla. 1939). See also *Page v. Watson*, 192 So. 205 (Fla. 1938). Therefore, it is evident that so long as a conviction stands, the person convicted is not eligible for employment as a police officer, regardless of whether the pardon is granted by Florida or a foreign jurisdiction.

At least one state Supreme Court has held that, "despite the strong legislative policy . . . that persons once convicted of felony are not thereafter to be entrusted with police duties . . ." a full pardon removes the absolute bar to application and consideration of employment since the statute involved imposes "a quasi penal, civil disqualification to be a police officer as an incident of, and automatically following upon, conviction for felony . . ." (*Commission of Met. Dist. Com. v. Director of Civil Service*, 203 N.E.2d 95, 103 (Mass. 1964)). This court held that it is within the discretion of the appointing authority to take into account the pardon and facts relating thereto in determining the applicant's moral character.

Florida has neither a statutory enactment nor judicial decision declaring that § 23.068(4), F. S., imposes a "quasi penal" disqualification to be a police officer as a result of having been convicted of a felony; neither is there any judicial precedent in Florida declaring that a quasi penalty barring employment as a police officer follows naturally or flows from having been convicted of a felony. There is no statutory or case law in Florida authorizing the adoption of the Massachusetts approach, and it is not within the province of my office to effect any change in the law. As stated in *Hess v. Town of Vestal*, Broome County, 290 NYS2d 295 (1968):

Policemen hold a special position of great sensitivity and public trust. By reason of such position it is in the public interest that such an employee should be subject to rigorous discipline in order that the safety of the community be properly maintained.

The Florida Supreme Court broached the question of whether a person has a constitutional right to government employment in *Jones v. Board of Control* 1961, 131 So.2d 713 at p. 717, wherein the court said:

Any right which an individual does have to work for the government... must necessarily be subject to all reasonable rules and regulations promulgated by the government in the interest of the public and for the well-being of the public services.

In *Headley v. Baron* 1969, 228 So.2d 281 at 284, the Supreme Court considered the question of whether a person has an "organic right to be a policeman" and held that "an individual has no constitutional right to be hired by the government."

While I strongly support the rehabilitation of those who have violated the law and advocate programs and policies designed to effectuate such rehabilitation, it must be recognized that the legislature has spoken clearly in delineating the broad special powers of the police standards council in § 23.067(1), F. S., and limiting the exercise of such powers by enacting § 23.068(4), F. S., the validity of which is assumed.

Of course, it is entirely possible that the Florida courts will follow the Massachusetts Supreme Court's lead noted above, but it is not within the authority of the Attorney General or the police standards council to adopt the Massachusetts approach as the law in Florida since it is the responsibility of my office to render opinions on what the statute says, and not on what the law should be. Any change in policy must necessarily be left to the determination of other branches of government.

In light of the above, your questions are answered accordingly.

070-158—November 10, 1970\*

#### TAXATION

#### INTANGIBLE PROPERTY TAX EXEMPTIONS—AFFILIATED GROUPS, CORPORATIONS—CONSOLIDATED RETURNS, CONSTRUCTION OF § 199.102, F. S., AS AMENDED BY CH. 70-185, LAWS OF FLORIDA

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

## QUESTIONS:

1. Is the privilege of making a consolidated return under § 199.102, F. S., as amended, limited to only those companies which hold certificates of authority under Ch. 624, Part III, F. S.?

2. Is the prohibition against taxation of intercompany accounts of the affiliated group *and* the intangible personal property of any members of an affiliated group, except the parent, limited to only those companies which hold certificates of authority under Ch. 624, Part III, F. S.?

3. Are affiliated groups which include companies that do not hold certificates of authority under Ch. 624, Part III, F. S., extended the privilege of:

a. Making a consolidated return with respect *only* to intercompany accounts which otherwise would be subject to taxation under the laws of Florida?

b. Making a consolidated return with respect to *both* intercompany accounts of the affiliated group *and* the intangible personal property of any members of an affiliated group, except the parent, which otherwise would be subject to taxation under the laws of Florida?

Questions 1, 2, and 3a., are answered in the negative. Question 3b. is answered in the affirmative as to all intercompany accounts and as to intangible personal property of those group members certified under Ch. 624, Part III, F. S.

Prior to the 1970 act, § 199.102, F. S., contained no reference to Ch. 624, F. S. (Authorization of Insurers), but simply permitted the filing of consolidated tax returns, on intercompany accounts, by any "affiliated group" of corporations connected with a common Florida parent corporation through stock ownership as defined in § 199.102(1), F. S., which definition included all corporations meeting certain proportionate stock ownership requirements. The provisions of § 199.102(2), F. S., now in question formerly stated in part: "In the case of consolidated returns, intercompany accounts shall not be subject to taxation under the laws of Florida."

Chapter 70-185, Laws of Florida (§ 199.102, F. S.), added the language noted below, to make this provision read as follows (bracketed enumeration is added for clarification):

... In the case of consolidated returns, [1] intercompany accounts of the affiliated group *and* [2] *the intangible personal property of any members of an affiliated group, except the parent, which hold certificates of authority under chapter 624, Part III, Florida Statutes*, shall not be subject to taxation under the laws of Florida. ... (Emphasis supplied.)

It is clear that where the statute formerly exempted only *intercompany accounts* on a consolidated return by an affiliated group (such group being defined by subsection (1), the amended provision exempts those accounts and, in addition, it exempts "the intangible personal property of any members of an affiliated group, except the parent, which hold certificates of authority under chapter 624." (Emphasis supplied.) Neither the privilege of making a consolidated return nor the exemption of intercompany accounts stated in § 199.102, F. S., is in my opinion restricted by Ch. 70-185. The antecedent reference of the words "which hold certificates" appears to be the word "members" in the immediately preceding clause, and not the word "group" in the first of the two stated subjects which the statute now declares "shall not be subject to taxation under the laws of Florida."

The conclusion above is fully substantiated by a consideration of the legislative history of Ch. 70-185. The original proposal, H. B. 4120, simply inserted after the words "intercompany accounts" (in the original provision above-quoted) the language "and the intangible personal property of the affiliated group except that of the parent." The intent expressed by that language was to add such property to that which was formerly exempt. Subsequent amendment to the bill (Journal of the House of Representatives, 2nd Regular Session 1970, p. 1073) effected a limitation or restriction on the scope of the new or additional exemption, which as finally enacted covers only intangible property of members holding certificates under Ch. 624, F. S.

Question 3 apparently inquires whether a consolidated return by those affiliated groups which include certificated and noncertificated companies may cover (a) *only* intercompany accounts of the group, or (b) both intercompany accounts of the group *and* intangible personal property of any members except the parent. Chapter 70-185, Laws of Florida, as above construed, extends the statutory exemption "in the case of consolidated returns" to cover intangible personal property of includable certificated insurance companies, in addition to intercompany accounts already exempt. The privilege accorded such a group is accordingly not limited to *only* intercompany accounts. The amended statute does extend the privilege to both intercompany accounts of the affiliated group and to "intangible personal property of any members . . . (except the parent), which hold certificates of authority under chapter 624, Part III, Florida Statutes." Part 3b. of the question presented is therefore answered affirmatively in part, to permit a consolidated return and exemption as to intercompany accounts of all members of the group and also as to other intangible personal property of these members (except the parent) holding certificates, but negatively as to intangible personal property of any members not holding such certificates.

In summary, Ch. 70-185, Laws of Florida, amends § 199.102(2), F. S., to extend the prohibition against taxation, in the case of consolidated returns by includable affiliated groups, to cover, in addition to intercompany accounts formerly covered, all intangible personal property of members which hold insurer's certificates under Ch. 624, part III, F. S. (except the parent company).

070-159—November 13, 1970

#### OCCUPATIONAL LICENSE TAXES

#### AUTOMOBILE DEALER OPERATING A REPAIR SHOP AND WRECKING SERVICE—LIABILITY FOR OCCUPATIONAL LICENSE TAX UNDER § 205.371, F. S., IN CONNECTION WITH ABANDONED AUTOMOBILES NOT HELD FOR SALE

To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee

#### QUESTION:

Does an automobile dealer, duly licensed by the department of highway safety and motor vehicles, who holds a state and county occupational retail store license under § 205.482, F. S., and a state and county occupational public service license under § 205.471, F. S., for the repair shop maintained in connection with his automobile business liable for occupational license tax under § 205.371(3), F. S., as a junk dealer, if he



also maintains a 24 hour wrecking service and hauls in wrecked and abandoned automobiles, stores them, and subsequently gives them away without selling any of the automobiles or parts thereof?

Section 205.371(1), F. S., provides in part:

(a) "*Junk*" means old or scrap copper, brass, rope, rags, batteries, paper, trash, rubber, debris, waste, *junked, dismantled, or wrecked automobiles or parts thereof*, iron, steel, and other scrap ferrous or nonferrous material. (Emphasis supplied.)

(b) "*Junkyard*" means an establishment or place of business which is maintained, operated, or used for storing, keeping, buying, or selling junk, or for the maintenance or operation of an automobile graveyard . . . (Emphasis supplied.)

\* \* \* \* \*

(d) "*Junk dealer*" means any person who is not a traveling junk dealer within the purview of § 205.372 and is engaged in the business of maintaining and operating a junkyard.

Although junked or wrecked automobiles are "junk" as defined by the statute, a junk dealer is a "person . . . engaged in the business of maintaining and operating a junkyard." The legal definition of business is closely related to the standard conception of that term. The generally acknowledged interpretation of "business" in the field of taxation, especially occupational or license taxes, may be summarized as follows:

A business is "that which occupies the attention and labor of men for the purpose of a livelihood or profit." (Emphasis supplied.) *City of Coos Bay v. Aerie No. 538 of Fraternal Order of Eagles*, 170 P.2d 389, 399 (Ore. 1946); *Glisson v. State Farm Mutual Automobile Insurance Co.*, 142 S.E.2d 447, 449 (S.C. 1965); *State v. Joe Must Go Club of Wisconsin*, 270 Wis. 108, 70 N.W.2d 681, 683 (1955); *Williams v. Tracy Builders*, 94 Ga. App. 203, 94 S.E.2d 139, 143 (Ga. Ct. App. 1956); *State v. Louisiana Baking Corp.*, 153 So. 41, 43 (La. Ct. App. 1934). It has also been held: "An enterprise not conducted as a means of livelihood or for profit generally does not come within the ordinary meaning of such terms." *City of Coos Bay v. Aerie No. 538 of Fraternal Order of Eagles*, *supra*; *Glisson v. State Farm Mutual Automobile Insurance Co.*, *supra*, at 450. "The word business does not mean an isolated or temporary adventure in another line of endeavor." *State v. Joe Must Go Club of Wisconsin*, *supra*. "[N]otwithstanding disguise in spelling and pronunciation, [it] means . . . [and] implies that one is kept more or less busy, that the activity is an occupation. It need not be one's sole occupation nor take all his time. It may be only seasonal, and not active the year around." *Snell v. Commissioner of Internal Revenue*, 97 F.2d 891 (5th Cir. 1938). "Business" is "that which occupies the time, attention, and labor of men for the purpose of livelihood or profit, but it is not necessary that it should be the sole occupation or employment." *State v. Louisiana Baking Corp.*, *supra*, at 43.

As clearly shown, all of the definitions imply "a profit motive when reference is made to doing business." *State v. Joe Must Go Club of Wisconsin*, *supra*. The concept is crystallized in *State v. Louisiana Baking Corp.*, *supra*:

An occupation or employment will not be excluded from the classification of business merely because it actually results in loss of profit; but it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued, in order to bring it within the accepted definition of the word.

Although the maintenance of a "junkyard" for the supplying of parts to an automobile repair shop is founded on a profit motive, the Florida Supreme Court has stated in *State ex rel. Dawes v. Nelson* 1945, 155 Fla. 399, 20 So.2d 394:

... when a person or corporation is engaged in a primary business and, as a feature of the primary business, an activity merely incidental thereto, and which serves no other person or business is engaged in, the incidental and restricted activity is not to be considered as intended to be separately or additionally taxed....

The application of this principle to the instant fact situation is inferred from the ruling in *State ex rel. Murray v. Wood*, 132 Fla. 325, 181 So. 381 (Fla. 1938), that the operation of a service department and a used car lot were incidental to the main business of selling automobiles under the laws existing in 1938.

Therefore, the answer to your inquiry is in the negative, if a person does not keep wrecked or abandoned automobiles for any type of profit motive or if keeping them is incidental to his normal business operation.

070-160—November 13, 1970

#### COURTS

##### COURT OF RECORD, BROWARD COUNTY; FILING FEES AUTHORIZED—COMPENSATION OF CLERK— CONSTRUCTION OF §§ 28.241, 28.231, F. S.; § 39, CH. 70-134, LAWS OF FLORIDA; § 145.065, F. S.

To: Clyde L. Heath, Clerk, Broward County Court of Record, Fort Lauderdale

#### QUESTIONS:

1. Does Ch. 70-134, Laws of Florida, repeal the provisions of Ch. 59-877, Laws of Florida, relating to the filing fees (including the law library fee) of the court of record of Broward County?

2. What is the effective date of Ch. 70-227, Laws of Florida, insofar as the increase in salary authorized for clerks of courts of record is concerned?

The applicable provisions of Ch. 70-134, Laws of Florida, are § 6, amending § 28.241, F. S.; § 39, adding a new § 28.231, F. S.; and § 40, the repealer clause. The new § 28.231, F. S., added by § 39, provides that

The clerk of any state appellate or county or state trial court shall receive as compensation for similar services the same charges as provided in this chapter for the clerk of the circuit court.

The clerk of the court of record of Broward County has the same status as the clerk of the circuit court, in that he is an elected public official whose compensation is required to be fixed by law. Under the maxim *noscitur a sociis*, general and specific words associated together take color from each other, so that "the general words are restricted to a sense analogous to the less general." *Dunham v. State*, Fla. 1939, 192 So. 324. As applied to the statutory provision in question, granting to "the clerk" of a state or county trial court the same service charges

awarded to the clerk of a circuit court, the maxim indicates a legislative intent to include those trial courts, and only those, in which the clerk has the same status as the clerk of the circuit court, that is, a duly elected or appointed public official whose compensation is required to be fixed by law. He is, therefore, in my opinion, "the clerk of a county or state trial court" within the intendment of § 28.231, F. S., and entitled to the fees or "service charges" authorized by § 28.241, F. S.

As to whether or not the clerk is entitled to charge an additional library fee, Ch. 59-877, Laws of Florida, prescribes a \$10.00 filing fee for civil proceedings and \$7.50 for criminal proceedings in the Broward County court of record. It requires that \$2.50 be deducted from the \$10.00 civil proceeding filing fee by the clerk and deposited in a special county law library fund.

The repealer clause of § 40, Ch. 70-134, Laws of Florida, provides that "the fees herein shall supersede and repeal all laws in conflict herewith except as provided in section 28.241." Section 28.241, F. S., prescribes the filing fee for civil proceedings in the circuit courts of this state. It was amended by § 6 of Ch. 70-134, Laws of Florida, to increase the filing fee from twelve to fifteen dollars and to change the word "fee" to "service charge" or "charges." It contains the following saving clause, originally added by Ch. 29749, Laws of Florida, 1955, and amended also by Ch. 70-134, Laws of Florida (§ 28.241, F. S.). (The additions made by the 1970 Act are shown below in brackets).

... [Service charges] in excess of those herein fixed may be imposed [by the governing authority of the county by ordinance,] by special or local law, and such excess shall be expended as provided by [such ordinance or] any special or local law, now or hereafter in force, in providing and maintaining facilities, including a law library, for the use of the courts of the county wherein the [service charges] are collected. . . .

No authority need be cited for the proposition that § 6 and 40 of Ch. 70-134, Laws of Florida, are to be construed *in pari materia* with each other and with special or local laws that "now or hereafter are in force" allocating a portion of the filing fee or service charge to a law library. Thus, under the repealer clause in § 40, Ch. 70-134, the fee of \$10 specified by Ch. 59-877, Laws of Florida, is superseded by the "service charge" of \$15 provided by § 6 of Ch. 70-134, Laws of Florida (carried forward as § 28.241(1), F. S., 1970). However, no intent to repeal the remainder of this particular provision of Ch. 59-877, Laws of Florida (allocating a portion of the \$10 filing fee to the county law library) must necessarily be implied, in view of the proviso contained in § 40, quoted above, "except as provided in Section 28.241, Florida Statutes," and the provisions of § 28.241, F. S., declaring, in effect, a legislative intent to save from repeal existing statutory provisions respecting law library and similar fees.

In light of these statutory provisions, the filing fee or service charge in the court of record of Broward County for filing a civil action or proceeding is \$15, of which \$2.50 must be deducted by the clerk and deposited in the county law library fund as provided by Ch. 59-877, Laws of Florida. Your first question is answered accordingly.

#### AS TO QUESTION 2:

Chapter 70-227, Laws of Florida, amends Ch. 145, F. S., by adding § 145.065, F. S., to set up a salary schedule for "a clerk of a court of record where he holds no other position of emolument . . ." The clerk of the Broward County court of record appears to qualify for the salary so fixed. The act became effective on June 27, 1970, and expressly

provides that "implementation of the salaries set forth in this act shall be regulated under the provisions of Section 145.065, F. S." (§ 1(10) of Ch. 70-227, Laws of Florida.) Examination of the legislative history of Ch. 70-227 reveals that § 10 of said chapter directing implementation of the salary set forth shall be regulated under the provisions of said § 145.065, F. S., added as amendment to H. B. 3712, and the amendment received favorable consideration by both the Senate and the House.

In the construction of statutes it is the intent of the legislature as gleaned from the statute that is the law. *Small v. Sun Oil Company* 1969, 222 So.2d 196. Statutes should be construed so as to ascertain and give effect to intention of the legislature as expressed in the statute. *Deltona Corp. v. Florida Public Utilities Commission* 1969, 220 So.2d 905. In making the judicial effort to ascertain legislative intent implicit in statutes, courts are bound by plain and definite language of the statute and are not authorized to engage in semantic nicety or speculations. *Tropical Coastline, Inc. v. Carter* 1960, 121 So.2d 779.

Thus, it is my opinion, the salaries provided clerks of courts of record in Ch. 70-227, Laws of Florida (§ 145.065, F. S.), should be paid clerks eligible to receive such compensation as of the date the act became law, i.e., June 27, 1970, and that the provisions of § 145.121(2)(b), F. S., do not apply. As noted in AGO 069-136, omitted from this report, and AGO 069-137, of this publication, salary increases for fee officers are computed on the basis of the calendar year. Salary increases for budget officer becomes effective upon the act providing the increase becoming a law. Question 2 is answered accordingly.

070-161—November 24, 1970

### TAXATION

#### INTANGIBLE PERSONAL PROPERTY, CLASS A—RULES AND REGULATIONS—RESPONSIBILITY FOR FILING TAX RETURNS

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

#### QUESTIONS:

1. Does the letter from the office of the comptroller dated July 14, 1966, directed to: "All Tax Assessors of the Several Counties," from: Intangible Tax Department Comptroller's Office, Subject: "Class 'A' Accounts; persons, individuals, corporations, etc., as agent for taxpayer," constitute a rule or regulation as contemplated by § 199.061, F. S.?

2. Do the provisions of § 199.071, F. S., or any other provision of Ch. 199, F. S., relieve a taxpayer of the responsibility of filing a return on Class A intangible personal property on which the total tax is less than one dollar?

3. Does Ch. 199, F. S., authorize banks or other corporations, institutions or persons doing a similar type business, credit unions, building and loan associations, savings associations, and other similar institutions to file an intangible tax return of Class A intangible personal property as agent for its depositors?

4. If question 3 above is answered in the affirmative, does the above-quoted language from § 199.071, F. S., or any other provision of Ch. 199, F. S., relieve banks or similar institutions of the responsibility of filing a return on Class A intangible



personal property on the accounts of those depositors on which the total tax would be less than one dollar?

The answer to questions 1, 2, and 4 is in the negative. The answer to question 3 is in the affirmative.

#### AS TO QUESTION 1:

Section 199.061(3), F. S., provides:

It shall be the duty of the department to make such rules and regulations as may be necessary to carry out and execute the intent of this chapter.

Section 120.011, F. S., provides:

**Legislative intent for part I.**—It is the intent of the legislature to establish a uniform procedure to be used by agencies in adopting rules and to provide notice of the adoption and content of rules, and that part I shall supersede all other laws on the same subject. Subsequent inconsistent laws shall supersede part I of this chapter only to the extent that they do so by express reference. No rule shall have retroactive effect unless expressly so provided, nor shall a rule impair or take away vested rights or benefits, other than procedural rights or benefits.

Section 120.021, F. S., provides:

**Definitions.**—For the purpose of part I:

(1) Agency means any state board, commission, department, or officer authorized by law to make rules, except the legislative and judicial departments of government, the military, and the governor.

(2) Rule means rule, order, regulation, standard, statement of policy, requirement, procedure, or interpretation of general application, including the amendment or repeal thereof, adopted by an agency to implement, interpret or make specific the law enforced or administered by it, or to govern its organization or procedure affecting the rights, duties, privileges or immunities of, or procedures available to the public or interested parties . . . .

Sections 120.031, 120.041 and 120.051, F. S., set forth certain requirements, such as content, notice and filing, for the valid adoption of rules and regulations for the departments and agencies affected by Ch. 120, F. S. Without doubt the office of the comptroller is subject to the requirements of Ch. 120, F. S., for the establishment of rules and regulations.

In the instant case the letter from the comptroller's office meets none of the requirements of Ch. 120, F. S., and in fact, it does not appear that the comptroller's office intended or attempted to comply with the provisions of Ch. 120, F. S. The letter at best is only an administrative interpretation or determination which is entitled to great weight, but it does not attain the status of a rule or regulation promulgated under Ch. 120, F. S. See *Green v. Wisner*, 119 So.2d 814, 2nd D.C.A., April 22, 1960; *Green v. State* 1964, 166 So.2d 585. To my knowledge there have been no rules and regulations promulgated pursuant to §199.061(3), F. S., above quoted.

#### AS TO QUESTION 2:

Section 199.071(1), F. S., provides in part, "... provided, however,

that no tax *shall be extended* on said intangible personal property tax roll in an amount less than one dollar." (Emphasis supplied.)

Section 192.001(6), F. S., defines "extend on the tax roll" as follows:

The arithmetic computation whereby the "millage" is converted to a decimal number representing one one thousandth of a dollar and then multiplied by the assessed value of the property to determine the tax on such property.

Section 192.001(13), F. S., defines "taxpayer" as: "The person or other legal entity in whose name the property is assessed."

The definition of "extend on the tax roll" is a new provision enacted by Ch. 70-243, Laws of Florida, and together with the underscored provision of §199.071(1), F. S., above-quoted, clearly indicates that the language of the proviso in §199.071(1), F. S., is directly solely to the ministerial duty of the tax assessor to perform an arithmetic computation. I find nothing in the quoted provisions of §199.071, F. S., or any other provision of Ch. 199, F. S., which relieves the taxpayer from his responsibility to file a return. This is not to say that the taxpayer may not appoint an agent or representative to file a return on his behalf though the taxpayer still remains primarily responsible.

#### AS TO QUESTION 3:

Section 199.051, F. S., provides that as to Class B intangible personal property, a list of registered holders of a company's securities may be furnished the tax assessor or the company may file a return as agent. See AGO 066-78, July 29, 1966, Biennial Report of the Attorney General, 1965-1966, p. 349. I find no such option relative to filing returns for Class A intangible personal property.

In the case of Central Florida Electric Company, Inc. v. Tummond, Jr., as Tax Collector, *et al*, Opinion of the 8th Judicial Circuit, Levy County, Case No. 9-63, dated December 16, 1969, which is the basis for your request, the court said, at p. 21:

6. *F.S. 199.101 makes it the duty of every person, firm or corporation in the state owning or having control, management or custody of intangible personal property which is subject to taxation to file a sworn return of the same and pay the tax thereon.* The Plaintiff's argument that it already pays intangible personal property tax on the value of its assets and that it should not be compelled to pay the same upon the value of one of its liabilities is not meritorious because, under the statute, it is a corporation having control, management or custody of monies having been previously contributed to it by its members and which it should someday refund to its patrons. Therefore, it should pay intangible personal property tax on its own account for the value of its own intangible personal property assets and *it should likewise be responsible for returning for taxation the intangible personal property which belongs to other persons, but over which it has control and custody. . . .* (Emphasis supplied.)

As indicated by the court, §199.101, F. S., makes companies having control, management or custody of Class A intangible personal property belonging to other persons the mandatory agent for the filing of a return of the taxpayer owning said intangible personal property.

## AS TO QUESTION 4:

As discussed in questions 2 and 3 above, the proviso in § 199.071(1), F. S., is directed solely to the ministerial duty of the tax assessor and does not relieve the taxpayer of the responsibility of filing a return. Section 199.101, F. S., does, however, make every person, firm or corporation having control, management or custody of intangible personal property of another the mandatory agent of said person owning the intangible personal property, for the purpose of filing the return required under Ch. 199, F. S. In doing so, it relieves the owner-taxpayer of the ministerial duty of filing the return but not the ultimate responsibility that it be done.

070-162—November 25, 1970

## PUBLIC FUNDS

PAYMENT FOR EXPENSES INCURRED FOR PUBLICATION  
OF LEGAL NOTICE OF A PUBLIC HEARING HELD  
PURSUANT TO PUBLIC LAW 91-224—AIR AND  
WATER POLLUTION CONTROL, UNAUTHORIZED

To: Vincent D. Patton, Executive Director, Department of Air and  
Water Pollution Control, Tallahassee

## QUESTION:

Can the department of air and water pollution control recover expenses for the publication of a legal notice of a public hearing to be published in a newspaper in the vicinity of a dredge and fill project, which hearing is authorized under Public Law 91-224?

After examination of the air and water pollution control act of 1967, as amended, this office concurs with your observation that your enabling act, Ch. 403, F. S., does not specifically provide that the department can charge a fee to recover the cost of the publication of a legal notice.

The First District Court stated in *Pridgeon v. Folsom* (1 Fla. App. 1965), 181 So.2d 222, at p. 226,

It is the settled law of this state that public officers have no claim to compensation for services rendered except when and to the extent that it is provided by law, and the statutes dealing with the compensation payable to public officials are to be construed strictly.

In the case of *Flood v. State ex rel. Board of Commissioners of Dade County* 1930, 100 Fla. 70, 129 So. 861, Justice Terrell stated,

It is settled in this state that fees collected by officers represent the charge which the state makes for services rendered by it through its officers, and constitute a fund subject to the control of the state and to be applied as the Legislature directs.

Departments and agencies of the state, as well as public officials, have no claim for the reimbursement of costs of official services rendered the citizen except to the extent that compensation may be provided by law. If no compensation is so provided, the services are deemed to be gratuitous. *Rawls v. State* 1929, 98 Fla. 103, 122 So. 222; *Gavagan v. Marshall* 1948, 160 Fla. 154, 33 So.2d 862.

For the reasons stated above, your question is answered in the negative. Should the board decide that reimbursement of the subject

costs are necessary, I suggest the department seek appropriate legislation in these particulars.

070-163—November 30, 1970

DIVISION OF PARI-MUTUEL WAGERING

TAX—DISTRIBUTION OF "BREAKS" TAX PURSUANT  
TO § 550.26, F. S.

To: A. R. Brautigam, Executive Director, Department of Business  
Regulation, Tallahassee  
Shelby Highsmith, Counsel, Division of Pari-mutuel Wagering, Miami

QUESTION:

May the proceeds of the "breaks" tax imposed by § 550.26, F. S., be distributed in accordance with the provisions of § 550.26, F. S., as appears in the 1967 Florida Statutes, or shall distribution of such funds be made in accordance with the provisions of § 550.26, F. S., as amended by Ch. 69-86, Laws of Florida, as to funds derived from a summer racing program?

The 1969 Legislature enacted several laws relating to the regulation of horse racing and pari-mutuel pool fund distributions. Material to your inquiries are the provisions of Chs. 69-14 and 69-86, Laws of Florida, with Ch. 69-14 appearing as § 550.40, F. S., and the several sections of Ch. 69-86 appearing as various amended sections of Ch. 550, F. S. Significantly, Ch. 69-14 adding § 550.42, F. S., became effective as a law May 14, 1969. Section 550.42(4), F. S., unequivocally required breaks tax revenues to be distributed as provided in § 550.26, F. S. No reference is made as to the designated § 550.26 is said section as appears in F. S., 1967 or F. S., 1969.

Since the reference to the distribution formula in § 550.26, F. S., became operative as of May 14, it is obvious the legislature intended distribution to be made in accordance with the then operative § 550.26, F. S., i.e., as appears in F. S., 1967, as distinguished from the subsequent distribution formula which became effective June 13, 1969, as a part of Ch. 69-86, Laws of Florida, and now appears as § 550.26, F. S., 1969.

Chapter 69-14, Laws of Florida, is an act of the legislature complete within itself dealing with the subject of the distinction between winter thoroughbred horse racing seasons and the summer thoroughbred horse racing seasons. It enables summer thoroughbred horse racing meets to be held in Florida and, insofar as such meets are concerned, controls. Since § 550.26, F. S., as amended by Ch. 69-86, Laws of Florida, was not in being on the effective date of Ch. 69-14, Laws of Florida, it is my opinion the summer racing act adopted provisions of § 550.26, F. S., 1967, and that said provisions remain effective as to the distribution of the "breaks" tax proceeds until such time as the legislature amends the language of § 550.42(4), F. S., as appears in § 2 of Ch. 69-14, Laws of Florida.

The rule is well stated in 50 Am. Jur. 58, 59, *Statutes*, § 39, citing *Hassett v. Welch*, 303 U.S. 303, 82 L.Ed. 858, 58 Sup. Ct. 559; Anno. 168 A.L.R. 632, 2 L.Ed. 2d 2048; In *Re Heath*, 144 U.S. 92, 36 L.Ed. 358, 12 Sup. Ct. 615.

... when a statute adopts a part or all of another statute, domestic or foreign, general or local, by a specific and descriptive reference thereto, the adoption takes the statute as it exists



at that time, and does not include subsequent additions or modifications of the adopted statute, where it is not expressly so declared. The subsequent amendment or repeal of the adopted statute is not within the terms of, and has no effect upon, the adopting statute, where the latter statute is not also amended or repealed expressly or by necessary implication. This rule prevails in the case of the adoption of a specific statute, as distinguished from the adoption of the law generally relating to a particular subject.

Upon consideration of the cited laws of Florida, statutes and authorities, it is my opinion that the division of pari-mutuel wagering of the department of business regulation would be authorized to allocate the proceeds of the "breaks" tax paid into the Florida horse racing promotion trust fund to reimburse the holder of a summer racing permit which has paid purses and prizes for overnight races in excess of the minimum required by statute, purses and prizes for stake races during the past season of the current year, and breeders' awards as authorized by § 550.38, F. S. Reimbursement to such summer racing permit holder may be made from moneys on deposit in the Florida horse racing trust fund to the extent of moneys available in that trust fund.

070-164—December 1, 1970

#### COUNTY GOVERNMENT

#### COUNTY OFFICERS' COMPENSATION—CLERKS OF COURTS OF RECORD—CH. 145, F. S., AS AMENDED BY CH. 70-227, LAWS OF FLORIDA (§ 145.065, F. S.)

To: E. D. "Bud" Dixon, Clerk, Polk County Criminal Court of Record,  
Bartow

#### QUESTIONS:

1. What is the effective date of Ch. 70-227, Laws of Florida?
2. When do the salary increases provided for in Ch. 70-227, Laws of Florida, amending Ch. 145, F. S., take effect for fee officers?
3. Based on the current population of Polk County, what will the compensation increase of the clerk of criminal court of record be under the provisions of Ch. 70-227, Laws of Florida, amending Ch. 145, F. S.?

#### AS TO QUESTION 1:

Chapter 70-227, Laws of Florida, provides in § 2 thereof that "This act shall take effect upon becoming a law." Chapter 70-227, Laws of Florida, became law without the governor's approval, was filed in the office of Secretary of State and became law on June 27, 1970. In answer to your first question, the effective date of Ch. 70-227, Laws of Florida, is June 27, 1970.

#### AS TO QUESTION 2:

This office has consistently held that compensation acts affecting fee officers apply to the entire year in which the act becomes effective. See AGO 058-57, Feb. 18, 1958, Biennial Report of the Attorney General, 1957-1958, p. 542; AGO 061-159, Oct. 3, 1961, Biennial Report of the Attorney General, 1961-1962, p. 266, question 3, and AGO 069-68, question 2, as modified by 069-136, omitted from this

report. It appears from the language in §1(10) as created by Ch. 70-227, Laws of Florida (§145.065, F. S.), that the legislature intended that this custom be followed. Accordingly, the salary increases provided for in Ch. 70-227, amending Ch. 145, F. S., take effect January 1, 1970.

#### AS TO QUESTION 3:

According to the census figures presently applicable, the population of Polk County is 195,139. This would place Polk County within the population brackets described in §1(7) of Ch. 70-227, Laws of Florida [§145.065(7), F. S.], which prescribes a salary for clerks of courts of record in "Counties having a population of at least 100,000 but less than 200,000" at \$15,500 per annum. Your third question is answered accordingly.

070-165—December 2, 1970

#### RETIREMENT

##### PROVISION FOR EMPLOYMENT OF RETIREES UNDER FLORIDA RETIREMENT SYSTEM, §121.091(9), F. S., NOT APPLICABLE TO RETIREES UNDER CHS. 122, 238 AND 321, F. S.

To: *W. Samuel Tucker, Jr., Secretary, Department of Administration,  
Tallahassee*

#### QUESTION:

Do the provisions concerning the limitation placed on employment after retirement covered in §9(9)(a), Ch. 70-112, Laws of Florida [§121.091(9)(a), F. S.], apply to persons who have retired or who may, in the future, retire under Ch. 122, F. S., the state and county officers and employees retirement system; Ch. 238, F. S., the teachers' retirement system; or Ch. 321, F. S., the highway patrol pension system?

As pointed out in your letter, the limitations regarding employment after retirement are quite different under Chs. 122, 238, and 321, F. S., respectively dealing with state and county employees, school teachers, and the Florida Highway Patrol. There is no specific repealing clause in Ch. 70-112, Laws of Florida, with regard to the above provisions in these other retirement acts. Any intent to repeal these prior statutory enactments would have to be implied from the wording of §9(9)(a), Ch. 70-112, Laws of Florida [§121.091(9)(a), F. S.] where it is stated that "Any person who has accepted and is receiving retirement compensation under this chapter" can hold other employment up to 500 hours during a calendar year. (Emphasis supplied.) This conflicts with provisions on the same subject matter in the other retirement systems.

I think it should be first kept in mind that repeals by implication are not favored in the law and that the presumption remains that all laws are intended to be consistent with each other. See 50 Am. Jur. Statutes, §363. The Florida courts have also followed the rule that presumes later statutes to be passed with knowledge of prior existing laws and that a statutory construction must be favored which gives a field of operation to two statutes, rather than construing one as being repealed by implication. *State Department of Public Welfare v. Galilean Children's Home*, 102 So.2d 388 (1958).

Following this established canon of construction, it is my opinion that the provision covering employment after retirement in §9(9)(a) of

Ch. 70-112, Laws of Florida[§ 121.091(9)(a), F. S.], does not repeal by implication the differing prior, unambiguous requirements for employment after retirement in Chs. 122, 238, and 321, F. S. Each provision has a field of operation in its particular retirement system. The wording of § 9(9)(a), Ch. 70-112, Laws of Florida[§ 121.091(9)(a), F. S.], demonstrates that it was the intent of the legislature to cover only that employment after receipt of retirement compensation "under this chapter," that is, the retirement system established by Ch. 70-112, as opposed to prior law. This distinction between the requirements of the differing retirement systems in Florida is recognized in § 1, Ch. 70-112[§ 121.011(3), F. S.], which states in part:

(3) PRESERVATION OF RIGHTS.—

(a) The rights of members of the retirement systems established by chapters 122, 238, and 321, Florida Statutes, shall not be impaired, nor shall their benefits be reduced by virtue of any part of this chapter . . .

The answer to your question must therefore be in the negative. The provisions concerning employment after retirement in Ch. 70-112, Laws of Florida, do not apply to persons who have retired or who may in the future retire under Chs. 122, 238, and 321, F. S.

070-166—December 3, 1970

TAXATION

AUTHORIZING LOCATION FOR COLLECTION OF COUNTY  
AND MUNICIPAL AD VALOREM TAXES—  
BRANCH OFFICES

To: L. T. Cloutier, City Clerk, High Springs

QUESTIONS:

1. Is it possible for county and municipal ad valorem taxes to be collected at a place other than the county seat?
2. If not, could collection at a place other than the county seat be authorized under a home rule ordinance?

Taxes may in my opinion be collected at a place other than the county seat only pursuant to authorization by law or ordinance applicable to a particular county. Question 1 would, therefore, be answered in the negative, assuming no such authorization exists for the county of Alachua, and question 2, in the affirmative.

Sections 167.433-167.439, F. S., pertain to collection of municipal ad valorem taxes, applying generally the laws governing county tax procedures. Chapter 197, F. S., governs collection of county ad valorem taxes. While collection procedures are outlined in these statutes there is no provision for the place of collection. Article VIII of the 1968 State Const. contains provisions for local government, stating in § 1(k), in part, "In every county there shall be a county seat at which shall be located the principal offices and permanent records of all county officers. . . ."

In answer to question 1, taxes would ordinarily be collected at the county seat under the constitutional provision above-quoted. In the absence of other specific authorization I would accordingly answer the question in the negative.

In answer to question 2, since the constitution and statutes are silent as to the place of collection, the subject would seem to be a proper one for treatment by ordinance under provisions of Art. VIII,

§ 1(f) and (g), State Const., together with implementing laws. Authority for this conclusion may be found in Art. VIII, § 1(k), State Const.: "...Branch offices for the conduct of county business may be established elsewhere in the county by resolution of the governing body of the county in the manner prescribed by law. . . ."

The general law provisions relating to home rule ordinances, §§ 125.65-125.69, F. S., do not deal with the subject of branch offices. They do, however, restate the general powers of counties as to local self-government, not inconsistent with general or special law, to be exercised by the boards of county commissioners by the enactment of county ordinances pursuant to law. Article VIII, § 1(f) and (g), State Const.

Collection of county and municipal ad valorem taxes is certainly "conduct of county business," consistent with Art. VIII, § 1(k), State Const. The tax collector is a constitutionally authorized county officer [Art. VIII, § 1(d) State Const.], and his duties are inherently county affairs and business. A resolution creating a branch office of the tax collector would therefore be within the terms of Art. VIII, § 1(k), State Const. However, should such branch office be established, its functions would be limited. Article VIII, § 1(k), State Const., requires that permanent records be at the county seat. It also stipulates that "no instrument shall be deemed recorded in the county until filed at the county seat according to law." Cf. AGO 067-23, May 18, 1967, Biennial Report of the Attorney General, 1967-1968, p. 38. It should also be noted that the Florida Statutes authorize tax sales to be performed only at the "courthouse door." Section 197.140, F. S.

I conclude therefore that, subject to the stated qualifications and pursuant to due authorization by law or county ordinance under the constitution, taxes may be collected at an established branch office located elsewhere than the county seat.

070-167—December 3, 1970

#### CIRCUIT JUDGES

#### AUTHORITY TO CARRY FIREARMS WHEN PERFORMING OFFICIAL DUTIES

To: C. Pfeiffer Trowbridge, Circuit Judge, Stuart

#### QUESTION:

May a circuit judge, when acting within the scope of his official duties or in the line of performance of duty, carry a pistol in the several counties of his circuit without complying with the licensing provisions of § 790.05, F. S., in each county?

For the reasons hereinafter stated, your question is answered in the affirmative. Section 790.05, F. S., provides that:

**790.05 Penalty for carrying pistol or repeating rifle without first obtaining license.**—Whoever shall carry around with him, or have in his manual possession, in any county in this state, any pistol, winchester rifle or other repeating rifle, without having a license from the county commissioners of the respective counties of this state, shall, upon conviction thereof, be punished by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding thirty days; provided, this section shall not apply to sheriffs, deputy sheriffs, city or town marshals, policemen, constables or United States marshals or their deputies as to the carrying of concealed weapons.



Section 790.051, F. S., sets forth certain exemptions from the licensing provisions of § 790.05, F. S., in the following words:

**790.051 Exemption from licensing requirements; law enforcement officers.**—*Law enforcement officers* are exempt from the licensing and penal provisions of this chapter *when acting at any time within the scope or course of their official duties or when acting at any time in the line of or performance of duty.* (Emphasis supplied.)

The term "law enforcement officer" is defined by § 790.001(8)(a) and (e), F. S., as follows:

(a) *All officers or employees of the United States or the State of Florida, or any agency, commission, department, board, division, municipality, or subdivision thereof, who have authority to make arrests[.]* (Emphasis supplied.)

\* \* \* \* \*

(e) *All peace officers[.]* (Emphasis supplied.)

A circuit judge comes under § 790.001(8)(a), F. S., because he is an officer of the state who has the authority to make arrests for breaches of the peace committed in his presence. He also comes within § 790.001(8)(e), F. S., because he is a peace officer.

Article V, § 25, State Const., provides that:

**SECTION 25. Judicial Officers as conservators of the peace.** All judicial officers in this state shall be *conservators of the peace.* (Emphasis supplied.)

12 C.J. 522 states the following with reference to "Conservator of the Peace":

**CONSERVATOR OF THE PEACE.** A term applied to those who have especial charges, by virtue of their office, to see that the King's peace is kept; an officer who has charge of preserving the peace, as a justice or sheriff; an officer authorized to preserve or maintain the public peace; *a peace officer; a common-law officer whose duties, as such, were to prevent and arrest for breaches of the peace in his presence, but not to arraign and try for them. . . .* (Emphasis supplied.)

70 C.J.S. 380 defines "peace officer" as follows:

*Peace officer.* An exceedingly comprehensive term, commonly used to refer to and describe those whose duty it is to preserve the peace. A "peace officer" is a conservator of the peace . . . . (Emphasis supplied.)

In *State v. Shockley* (Utah), 80 P. 865 at 868, the Sup. Ct. of Utah said:

... In 8 Cyc. 586, conservators of the peace are defined as "common-law officers whose duties, as such, were to prevent and arrest for breaches of the peace in their presence." . . . .

In *Smith v. Abbott* (N.J.), 17 N.J.L. 358, the New Jersey Supreme Court said:

... A justice of the peace is not, and never was an officer at the common law, strictly. They were first created by stat. 1 Ed. 3 cap. 16. This statute provides "that for the better keeping and maintenance of the peace, the King willeth that in

every county, good men and lawful, which be no maintainers of evil, or barrators in the county, shall be assigned to keep the peace." Prior to this act, conservators of the peace had been elected by the people. They were common law officers, and their duties as such, were to prevent and arrest for breaches of the peace in their presence, Dalt. C. 1, but not to arraign and try for them, 2 Burn's Just. 577. . . . (Emphasis supplied.)

In *Jones v. State* 1901 (Texas), 65 S.W. 92, Jones, a County Judge, was convicted of carrying a pistol. The Constitution of Texas made county judges conservators of the peace and the pistol law excluded peace officers from its provisions. In reversing Jones' conviction, the Texas Court of Criminal Appeals said:

... A reference to article 4, §15, of the constitution, shows that the organic law creates, in express terms, county judges "conservators of the peace." According to the dictionaries, a conservator is a preserver or maintainer. See 1 Rap. Law Dict.; Cent. Dict. A conservator of the peace is an officer authorized to preserve or maintain the public peace. *Id.* It would therefore seem to follow that one who is authorized to preserve or maintain the public peace is a peace officer. . . . We hold that the constitution makes county judges peace officers, and that when the legislature, in enacting the pistol law, excluded from its operation all peace officers, appellant was embraced in this list, and as such peace officer he was authorized to carry a pistol. . . . (Emphasis supplied.)

This decision was cited with approval in *United States v. Viess* 1921, 273 Fed. 279, where the court said: "... A conservator of the peace is a peace officer. *Jones v. State* (Tex.Cr.App.) 65 S.W. 92. . . ."

In *Ex Parte Levy* (Ark.), 163 S.W.2d 529, the Supreme Court of Arkansas dealt with a section of the Arkansas Constitution which provided that the judges of the Supreme Court should be conservators of the peace throughout the state. The court said with reference to this provision:

Now, this section quoted above does make the judges of the Supreme Court conservators of the peace throughout the state. But who and what is a conservator of the peace? Many definitions of the term, "Conservator of the peace," are found under that title in Words & Phrases, and the one most frequently given is that the term, "Conservator of the peace," is synonymous with the term, "Peace officer." The origin of this office and the functions of that official are there defined as follows: "'Conservator of the peace' was the name of a common-law officer, which, prior to St. 1 Ed. iii, c. 16, authorizing the appointment of justices of the peace, were elected by the people. They were common-law officers, and their duties as such were to prevent and arrest for breaches of the peace in their presence, but not to arraign and try the offender. *Smith v. Abbott*, 17 N.J.L. (2 Har.) 358, 366; *In re Barker*, 56 Vt. 14, 20." Vol. 8 Words and Phrases, Permanent Edition, page 645. (Emphasis supplied.)

Upon consideration of the above-cited authorities, I conclude that a circuit judge is a "law enforcement officer" within the purview of § 790.001(8)(a) and (e), F. S., because he is a state officer who has authority to make arrests for breaches of the peace committed in his presence, and he is a peace officer.

It therefore follows that circuit judges come within § 790.051, F.

S., and are exempt from the licensing requirements of § 790.05, F. S., when they carry a pistol in any county in their respective judicial circuits "when acting at any time within the scope or course of their official duties or when acting at any time in the line of or performance of duty."

The result is that, as indicated above, it is my opinion that your question is properly answered in the affirmative.

070-168—December 4, 1970

#### MUNICIPALITIES

#### ASSESSMENTS FOR LOCAL IMPROVEMENTS— COMPUTATION OF PENALTIES FOR NONPAYMENT

To: Seymour H. Rowland, Jr., City Attorney, Ocala

#### QUESTIONS:

Should the one percent penalty directed to be added to an installment which is not paid when due, as provided in § 170.09, F. S., be computed upon the basis of the entire principal balance of the assessment outstanding at the time of the delinquency, or should the penalty be computed only upon the amount of the particular delinquent installment?

Section 170.09, F. S., reads in pertinent part as follows:

Said assessments shall be payable at the time and in the manner stipulated in the resolution providing for said improvements, and said special assessments shall remain liens, coequal with the lien of all state, county, district and municipal taxes, superior in dignity to all other liens, titles and claims, until paid, and shall bear interest at a rate not to exceed eight percent per annum from the date of the acceptance of said improvement and may, by the resolution aforesaid, be made payable in not more than ten equal yearly installments, to which, if not paid when due, *there shall be added a penalty at the rate of one percent per month, until paid . . .* (Emphasis supplied.)

Standing alone, § 170.09, F. S., would seem to indicate that the penalty is only imposed on the installment which is overdue. However, when § 170.09 is read in conjunction with § 170.10, F. S., a question of construction is raised.

Section 170.10, F. S., states in part:

Each annual installment provided for in § 170.09 shall be paid upon the dates specified in said resolution, with interest upon all deferred payments, until the entire amount of said assessment has been paid, and upon the failure of any property owner to pay an annual installment due, or any part thereof, or any annual interest upon deferred payments, the governing authority of the municipality shall cause to be brought the necessary legal proceedings by a bill in chancery to enforce payment thereof with all accrued interest and penalties, together with all legal costs incurred, including a reasonable solicitor's fee, to be assessed as part of the costs and in the event of default in the payment of any installment of an assessment, or any accrued interest on said assessment, *the whole assessment, with the interest and penalties thereon, shall*

*immediately become due and payable and subject to foreclosure. . . .* (Emphasis supplied.)

It is a basic legal principle that penalties are not favored in law or equity and should only be applied in cases which are free from doubt. 70 C.J.S. *Penalties*, § 1 (1951). Statutory provisions for penalties must be strictly construed. *Hotel and Restaurant Commission v. Sunny Seas No. One*, 104 So.2d 570 (Fla. 1958).

Even applying a rule of strict construction, the penalty provision of § 170.10, F. S., is clear. The portion in question provides that in the event of default, "the whole assessment, with the interest and penalties thereon," becomes due. The clause containing "interest" and "penalties" clearly applies to the words that precede it; that is, "whole assessment." Thus, it is my opinion that the interest and penalty provisions of § 170.10, F. S., apply to the entire principal balance of the assessment outstanding at the time of acceleration.

070-169—December 4, 1970

### TAXATION

#### DOCUMENTARY STAMPS—TAXABILITY OF CEMETERY DEEDS UNDER CH. 201, F. S.

To: *Duncan and Ford, City Attorneys, Tavares*

#### QUESTION:

Is it necessary, pursuant to Ch. 201, F. S., that documentary stamps be affixed to cemetery lot deeds issued by a municipality?

Section 201.02, F. S., places documentary stamp tax liability on, "deeds, instruments, or writings whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser, or any other person by his direction . . . ." Section 201.021, F. S., places an additional surtax on those documents taxed under § 201.02, F. S.

There is nothing in Ch. 201, F. S., which exempts cemetery lots from documentary stamp taxation. This interpretation is entirely consistent with an earlier Attorney General's Opinion dated June 11, 1932, Biennial Report of the Attorney General, 1931-1932, p. 1000. Thus, cemetery deeds are taxable under Ch. 201, F. S., in the same manner as any other transfer of land.

The existence of documentary stamp tax liability under Ch. 201, F. S., is not affected by the exempt status of one of the parties. Attorney General Opinion 068-10, Jan. 19, 1968, Biennial Report of the Attorney General, 1967-1968, p. 176, and AGO 062-150, Nov. 8, 1962, Biennial Report of the Attorney General, 1961-1962, p. 616. Since Ch. 201, F. S., does not place specific liability on either the grantor or the grantee, the responsibility is placed on the nonexempt party when the conveyance concerns an exempt party such as the state or a municipality and a private individual. Therefore, the only situation in which no documentary stamp tax liability would exist is a conveyance between two exempt parties.



070-170—December 4, 1970

**AIR AND WATER POLLUTION CONTROL**  
**PERMITS FOR OPERATION, CONSTRUCTION OR EXPANSION**  
**OF AIR AND WATER POLLUTION SOURCES**

To: Vincent D. Patton, Executive Director, Department of Air and Water Pollution Control, Tallahassee

**QUESTIONS:**

1. Does Ch. 403, F. S., provide the department of air and water pollution control with sufficient authority to establish a permit system, by rules and regulations, which would require a person, as defined in said chapter, to obtain a permit prior to the construction or expansion, or for the operation, of any installation that may be a source of air or water pollution?

2. Does the department have the authority to provide a procedure for the denial, issuance, and revocation of such a permit?

3. If a person obtains a permit as required by rules and regulations of the department and violates the conditions of the permit, any rule or regulation of the department, or provision of Ch. 403, F. S., what is the penalty for such violation?

4. If a person fails to obtain a permit as required by such rules and regulations, what is the penalty for such violation?

Section 403.061, F. S., relating to the powers and duties of the department of air and water pollution control provides in part as follows:

The department shall have the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules and regulations adopted and promulgated by it, and for this purpose to:

\* \* \* \* \*

(16) *Establish a permit system whereby a permit may be required for the operation, construction or expansion of any installation that may be a source of air or water pollution; provide for the issuance and revocation of such permits and for the posting of an appropriate bond to operate. (Emphasis supplied.)*

(17) Consult with any person proposing to construct, install, or otherwise acquire a pollution control device or system, concerning the efficacy of such device or system, or the pollution problem which may be related to the source, device or system. Nothing in any such consultation shall be construed to relieve any person from compliance with this act, rules and regulations of the department, or any other provision of law.

(18) Require that notice be given to it prior to the undertaking of the construction or installation or expansion of any new air or water contaminant sources. Within thirty days of its receipt of such notice, the department shall require, as a condition precedent to the construction or installation or expansion of such sources, the submission of plans, specifications, and such other information as it deems necessary in order to determine whether the proposed construction or installation will be in accord with applicable laws, rules and regulations. If within sixty days of the receipt of plans, specifications or other

information required pursuant to this chapter, the department determines that the proposed construction or installation will not be in accord with the requirements of this act or applicable rules and regulations, it shall issue an order prohibiting the construction or installation. Failure of such an order to issue within the time prescribed herein shall be deemed a determination that the construction or installation may proceed; provided, that it is in accordance with plans, specifications or other information, if any, required to be submitted.

In view of the foregoing, your first question is answered in the affirmative, assuming, of course, that the provisions of § 403.051, F. S., requiring hearings and notices thereof relative to the adoption or repeal of rules and regulations are complied with.

With reference to your second question, I believe that the provisions of § 403.061(16), F. S., answers your question in the affirmative. A cursory search of Ch. 17-4, Florida Administrative Code, cited as the rules of the department of air and water pollution control relative to permits, indicates that a procedure for the issuance and revocation of permits similar to the procedure provided in most of the laws of regulatory boards for the issuance and revocation of licenses may be adopted. To insure due process to all parties affected, the procedure of part II, Ch. 120, F. S., shall be followed at all hearings of the department, including rule-making hearings. (See also § 403.051, F. S.)

In reply to your third question, it appears that the same penalties for the enforcement of the rules, regulations, orders and laws relating to the department of air and water pollution control would apply to the enforcement of rules governing the requirements, denial, issuance and revocation of permits. The provisions for the enforcement of a violation of a rule, regulation, order, or provision of Ch. 403, F. S., is threefold: (1) Section 403.121, F. S. provides for an administrative hearing, if the department has reason to believe that such a violation has occurred; usually such hearings are held before a hearing officer as provided in § 403.061(9), F. S. (2) Section 403.131, F. S., provides for injunctive relief to enforce Ch. 403, F. S., rules, regulations or orders issued pursuant thereto. (3) Section 403.161, F. S. as amended by Ch. 70-356, Laws of Florida, further provides a penalty for failure to comply with any order or permit issued pursuant to the authority of the department.

Replying to your fourth question, it is my opinion that the same penalties set forth in reply to your third question would apply, except that there would be no permit to revoke. However, after due notice and hearing, an order may be issued requiring a permit for the operation, construction, or expansion of any facility or installation that may be a source of air and water pollution; such an order may be enforced as any other order or rule of the department.

070-171—December 8, 1970

#### INDUSTRIAL DEVELOPMENT AUTHORITIES

##### SUBJECTIVITY TO TAXES REQUIRED ON DOCUMENTS PURSUANT TO CHS. 199 AND 201, F. S.

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

#### QUESTIONS:

1. Are the notes or bonds issued by an industrial development authority subject to the intangible tax imposed by Ch. 199, F. S.?

2. Are the notes or bonds issued by the authority subject to the documentary stamp tax imposed by Ch. 201, F. S., and, if so, are they taxable under § 201.07 or § 201.08, F. S.?

3. Is the real estate mortgage given by the authority to secure the notes and bonds subject to Class C intangible personal property tax imposed by Ch. 199, F. S.?

4. Is the lease-purchase agreement (installment sale contract) from the authority to an industrial corporation subject to documentary stamp tax imposed under Ch. 201, F. S.?

5. Is the lease-purchase agreement (installment sale contract) between the authority and the industrial corporation subject to a Class C intangible personal property tax imposed by Ch. 199, F. S.?

6. Is the deed of conveyance ultimately to be given by the authority to the industrial corporation, subject to the documentary stamp tax imposed by Ch. 201, F. S.?

Questions 1, 2, and 3 are answered in the negative, and questions 4, 5, and 6 are answered in the affirmative.

The tax exemption section of the Florida industrial development financing act[§ 159.31, F. S.], reads, in part, as follows:

... [T]he local agency shall not be required to pay any taxes on any project or any other property owned by the local agency under the provisions of this part or upon the income therefrom, and the bonds issued under the provisions of this part, their transfer, and the income therefrom (including any profit made on the sale thereof), shall at all times be free from taxation by the state or any local unit or political subdivision or other instrumentality of the state. Nothing in this section, however, shall be construed as exempting from taxation or assessments the leasehold interest of any lessee in any project or any other property or interest owned by any lessee . . . .

Section 7, Ch. 70-229, Laws of Florida(§ 159.50, F. S.), repeats the quoted provision without substantive change in conjunction with its general authorization for development authorities. Your questions are based on transactions by the Polk County Industrial Development Authority created by Ch. 69-1510, Laws of Florida, in compliance with, and in implementation of, the general law, Ch. 159, F. S. The powers and authorities conferred on such authorities by Ch. 70-229, Laws of Florida(§ 159.44-159.53, F. S.) are supplemental and in addition to existing powers.

Questions 1, 2 and 3 are in my opinion controlled by the two provisions of the above exemption statute stating "the local agency shall not be required to pay any taxes on any project" and "the bonds issued . . . shall at all times be free from taxation." In transactions between the Authority and a national bank, such as those represented by instruments forwarded by you covering the financing of such projects, the Authority is exempted from liability for state and local taxes by the language: "the local agency shall not be required to pay any taxes on any project." This exemption would be applicable to both ad valorem and excise taxes, since the courts have held such language to be broadly inclusive. *American Can Co. v. City of Tampa* 1943, 152 Fla. 798, 14 So.2d 203, 209. See also AGO 070-131 of this publication with reference to exemption of rentals from the tax imposed by Ch. 212, F. S.

While the industrial development authority is exempt from all taxes, that exemption does not extend to other parties to a transaction with the authority. Attorney General Opinion 068-10, Jan. 19, 1968,

Biennial Report of the Attorney General, 1967-1968, p. 176. Plymouth Citrus Growers Association 1946, v. Lee, 157 Fla. 893, 27 So.2d 415; Choctawhatchee Elec. Coop. v. Green, Fla. 1961, 132 So.2d 556. However, the exemption provided in § 159.31, F. S., for the bonds should inure to the benefit of any party. Accordingly, although U. S. Public Law 91-156 (Dec. 24, 1969) removed the immunity status of national banks as to such taxes, there would in my opinion be no liability before or after Dec. 24, 1969, for taxes on bonds given by an industrial development authority to a bank or other party because the Florida statute specifically exempts such instruments as well as the authority. Section 159.31, F. S., provides in part:

... [T]he bonds issued under the provisions of this part, their transfer, and the income therefrom (including any profit made on the sale thereof), shall at all times be free from taxation by the state or any local unit or political subdivision or other instrumentality of the state. ...

The word "bonds" as used in the tax exemption section of the Florida Industrial Development Financing Act is defined in § 159.27(1), F. S., as follows:

"Bonds" or "Revenue bonds" means the bonds authorized to be issued by any local agency under this part, which may consist of a single bond. The term "bonds" or "revenue bonds" shall also include a single bond, a *promissory note or notes*, or other debt obligations evidencing an obligation to repay borrowed money *together with any security instruments* or agreements securing repayment of such borrowed money and payable solely from the revenue derived from the sale, operation, or leasing of any project. (Emphasis supplied.)

Section 3(6) of Ch. 70-229, Laws of Florida (§ 159.44(6), F. S.), states:

"Florida Industrial Development Financing Act" means ... [§ § 159.25-159.43, F. S.] and any amendments thereto, and the definitions contained therein shall also be applicable to this act [§ § 159.44-159.53, F. S.] and to any bonds issued under this act.

The mortgage therefore appears to be encompassed in the tax-exempt instruments and, like the notes or bonds, not subject to taxation.

Since the statute by its terms exempts the Authority and the bonds from "any taxes" and such exemption is construed to extend to all taxes, ad valorem and excise, the notes or bonds issued by the Authority are not subject to the intangible property tax imposed by Ch. 199, F. S., or the documentary stamp tax imposed by Ch. 201, F. S., and the real estate mortgage given by the authority to secure said notes or bonds is not subject to the Class C intangible personal property tax imposed by Ch. 199, F. S.

Questions 4, 5 and 6 concern liability for documentary stamps and Class C intangible personal property taxes on the lease-purchase agreement and the eventual deed of conveyance between the Authority and the industrial corporation.

As previously stated, the Authority is not subject to any taxes on the transactions or property involved. However, § 159.31, F. S., expressly excludes the interest of a lessee from the exemption. Prior to the 1970 legislation, the pertinent provision of § 159.31, F. S., stated:

... Nothing in this section, however, shall be construed as



exempting from taxation or assessments the leasehold interest of any lessee in any project or any other property or interest owned by any lessee, and if any project or any part thereof shall be occupied or operated by any private corporation, association, partnership, or person pursuant to any contract or lease with the local agency, the property interest created by such *contract* or lease shall be subject to taxation to the same extent as other privately-owned property. (Emphasis supplied.)

Section 7, Ch. 70-229, Laws of Florida (§ 159.50, F. S.), contains the abbreviated exclusion:

... Nothing in this section, however, shall be construed as exempting from taxation or assessments the leasehold interest of any lessee in any project or any other property or interest owned by any lessee.

The opinion of the court in *American Can Co. v. City of Tampa* 1943, 14 So.2d 203, at 209, construed similar statutory enactments, concluding that excess language was deleted because it was superfluous. And as noted above, exemption of one party to a transaction does not remove the tax liability for other parties. *Plymouth Citrus Growers Association v. Lee* 1946, 157 Fla. 893, 27 So.2d 415.

Section 196.25(2)(c), provides for taxation of assessable property interests when tax exempt or immune property is used by private parties for nonexempt purposes, but states that the section shall not apply when "property is owned or used by the state, any county, municipality, or public entity or authority created by statute and is leased or otherwise made available to such person, firm, corporation, partnership or organization by such public body for a consideration in the performance by the public body of a public function or public purpose authorized by law." Any potential utilization of this latter provision by the industrial development authority's lessee, however, appears to be nullified by § 159.31, F. S., and § 7, Ch. 70-229, Laws of Florida (§ 159.50, F. S.). As previously noted § 159.31, F. S., provides:

... if any project or any part thereof shall be occupied or operated by any private corporation, association, partnership, or person pursuant to any contract or lease with the local agency, *the property interest created by such contract or lease shall be subject to taxation to the same extent as other privately-owned property.* (Emphasis supplied.)

The 1970 legislation states that the lessee's interest shall not be tax exempt. The provisions clearly indicate, in my opinion, that the legislature did not intend for private leasehold interests in industrial development authority projects to come within the purview of any statutory exception to taxation such as that stated in § 196.25(2), F. S.

The lease-purchase agreement in question, an installment sale contract, constitutes a binding promise to pay which would appear to be subject to the documentary stamp tax in § 201.08, F. S. Attorney General Opinion 062-145, Nov. 5, 1962, Biennial Report of the Attorney General, 1961-1962, p. 606. The documentary stamp tax is a transaction tax levied on transactions involving certain instruments. *Plymouth Citrus Growers Association v. Lee*, mentioned above. The instrument is within the statute, and although the authority is exempt (under the stamp tax statute both parties are charged), the purchaser-lessee remains liable. Section 201.01, F. S. states that documentary stamp taxes shall be paid "by any person, who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships the same [the documents],

or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned, or shipped in the state."

The documentary stamp tax on the written obligation to pay is separate from the documentary stamp tax on conveyances of interests in land and can be separately imposed. AGO 061-8, Jan. 23, 1961, Biennial Report of the Attorney General, 1961-1962, p. 14; AGO 059-244, revised Feb. 25, 1960, Biennial Report of the Attorney General, 1959-1960, p. 381. This imposition has not been considered double taxation, but a tax on two transactions, which may be evidenced by one instrument.

In *DeVore v. Lee*, Fla. 1947, 30 So.2d 924, the court held that the lease in question was not an obligation to pay money, for such obligation was contingent upon lessee's use of the land and "ripen[ed] into a debt only as the times for payments of rent arrive[d]." See also *State v. Green*, Fla. 1961, 132 So.2d 761. Such is not the case here. Under the instruments now in question the rental payments are secured by the facilities constructed or installed upon the premises and by liability insurance. It should also be noted that in the event of failure to make timely payments, lessor, the authority, is empowered to "declare all sums which lessee is obligated to pay pursuant to [the] Agreement, together with interest accrued thereon, immediately due and payable." The facts are similar to those treated in an opinion of my predecessor in which the lease-purchase agreement was considered a conditional sale. Attorney General Opinion 060-34, Feb. 18, 1960, Biennial Report of the Attorney General, 1959-1960, p. 490.

The situation may also be compared to that involved in *United States v. State of Minnesota*, 113 F. Supp. 488 (D. Minn. 1953), when a corporation conveyed its plant to the United States government by deed giving the corporation an option to purchase, and the government leased the plant back to the corporation. There the district court held that the transaction was a conditional sale under the Lend-Lease Act, 22 U.S.C.A., §§ 411-419; Defense Aid Supplemental Appropriation Act, March 27, 1941, 55 Stat. 53. In that case, the option to purchase, if utilized, could be exercised by the lessee corporation upon the termination of the lease, and the purchase price or consideration was the actual value of the complex. The purchase option in the present situation at the nominal consideration of one dollar, following completion of the contract rental payments, appears to be analogous.

Section 159.28(3), F. S., grants the Authority the power "*to make and execute agreements of lease, contracts, deeds, and other instruments necessary or convenient in the exercise of the powers and functions of the local agency under this part.*" (Emphasis supplied.) That subsection (5) confers the power "*to sell, lease, exchange, transfer, or otherwise dispose of, or to grant options for any such purposes with respect to any real or personal property or interest therein.*" Although the conditions of the lease-purchase agreement are consonant with those allowed in the "agreements of lease" under § 159.30, F. S., the authority has the power to enter into an installment sale contract under §§ 159.28, and 159.31, F. S., provides against exemption of interests thereunder. The 1970 legislation § 4(i), Ch. 70-229, Laws of Florida [§ 159.47(9), F. S.], contains the following authorization:

[The authority] may sell such capital projects to the industry using the project on an installment purchase contract or other type of purchase contract with such security instruments or trust agreements as the authority shall deem adequate, in which case such [the transaction] shall be deemed to be a sale and not a lease of such project.

Since the lease-purchase agreement appears to be a sales contract or agreement for deed also incorporating an obligation to pay stated amounts, it is in my opinion taxable under §§ 201.02 and 201.08, F. S. AGO's 059-244, revised and 061-8 mentioned above.

In answering questions 4, 5, and 6, the interrelation of the transactions must be taken into account, as well as the separate taxable activities. The lease-purchase agreement (installment sale contract) is subject to documentary stamps on the promise to pay money pursuant to § 201.08, F. S., and the conveyance of an interest in land per § 201.02, F. S. It is also subject to the Class C intangible tax under Ch. 199, F. S. *Jasper v. Orange Lake Homes, Inc.*, 151 So.2d 331 (2d D.C.A. Fla. 1963). As stated in AGO 059-244, Nov. 25, 1959, Biennial Report of the Attorney General, 1959-1960, p. 381:

The . . . contract to sell and convey transfers to the purchaser an equitable title . . . . The legal title remains in the seller until the purchase price is paid in full. . . . [T]he making of the deed of conveyance passes the complete title to the purchaser; these steps complete a single complete transaction. . . . [A]ny taxes imposed, under § 201.02, F. S., upon the contract of sale as an equitable conveyance, should be taken into consideration when determining the tax upon the deed of conveyance. . . . [T]he statute contemplates the collection of a single tax on the purchase price of the real property [and] . . . any tax paid upon the transfer of the equitable title should be credited on the total tax due, when considering the taxes due on the deed of conveyance.

The measure of consideration for this tax appears to be the amount due and payable at the time the instrument is recorded and the equivalent equitable interest conveyed in the property. The measure of documentary stamp taxes due on the deed will be the amount of actual consideration, designated as annual rental payments, less the amount upon which tax has already been paid on the conveyance of the property interest taxed at recordation of the initial instrument, since credit must be given in the amount of tax already paid.

In summary, the notes, bonds, and mortgage issued by the authority are not subject to intangible or documentary stamp taxes; the installment sale contract is subject to documentary stamp tax under §§ 201.02 and 201.08, F. S., and to Class C intangible tax under Ch. 199, F. S.; and the deed ultimately given will be taxable under Ch. 201, F. S., subject to credit in the manner above noted.

070-172—December 9, 1970

#### TAXATION

##### ASSESSMENTS—SUFFICIENCY OF FINDINGS BY TAX ARBITRATORS—§ 194.033, F. S.

To: *James Cowart, Chairman, Board of Tax Adjustment, Wauchula*  
QUESTION:

Must a report by tax arbitrators under § 194.033, F. S., contain findings of fact meeting acceptable standards of particularity in order to warrant acceptance of the report by the board of tax adjustment as a basis for changing the assessor's assessment?

Assuming compliance with all procedural requirements for arbitration (which I am unable to determine from the enclosures), I believe the board of tax adjustment may accept the written decision fixing the assessment in question.

The controlling statute, § 194.033, F. S., as amended by § 28 of Ch. 70-243, Laws of Florida, effective June 30, 1970, provides:

**Review of assessment by arbitration.**—If any taxpayer is dissatisfied with the action of the board of tax adjustment, he may, within ten days from the issuance of the decision, give notice to the board that he demands an arbitration, giving at the same time the name of his arbitrator. The board shall name its arbitrator within five days thereafter, and these two arbitrators shall select a third. *A majority of them shall fix the assessments and the property on which such taxpayer shall pay taxes. Such decision shall include a finding of facts and be in writing, and it shall be final unless overturned by a court of competent jurisdiction.* The arbitrators shall render their decision within ten days from the date of the naming of the arbitrator by the board unless all arbitrators agree to a later time. In the event the two arbitrators provided for in this section fail to name a third within five days after their appointment, he shall, upon petition asserting such facts, be named by a circuit judge of that county, and the three arbitrators shall then have five days in which to render a decision after the naming of the third arbitrator by the court. No elected or appointed official or employee of state or local government or any agency thereof may be appointed as arbitrator. Any cost of arbitration shall be assessed by a majority of the arbitrators against the county and school board, the taxpayer, or both, as they deem appropriate. (Emphasis supplied.)

The law requires that "such decision shall include a finding of facts and be in writing." The factual findings to be made are not prescribed by the statute, nor does there appear to have been any implementation of such regulatory power as may be vested in the department of revenue to prescribe forms for use in arbitration proceedings. The decision submitted by you and signed by the three arbitrators acting in this instance together with the supplemental report in response to "request for additional information and comparables," shows only a description or finding as to the properties submitted, a summary of related property transactions indicating value, and a statement as to the total "fair market value" found.

The general rule recognized in 6 C.J.S. *Arbitration and Award*, § 74(b), p. 214, is as follows:

Statutes requiring awards in arbitrations thereunder to state separately the finding of facts and the conclusions of law should be complied with. It has been held, however, that a non-compliance is not a jurisdictional defect such as renders an award absolutely void, but it is a mere irregularity which the parties may waive.

Section 194.033, F. S., provides that the decision shall be final unless overturned by a court, and does not expressly delineate or incorporate by reference any procedures or grounds upon which the award may be attacked. Cf. Ch. 682, F. S., and cases collected in annotation 82 A.L.R. 2d 970. Because of this statutory omission, as well as the fact that the general validity and effect of the law is presently in litigation, my consideration at this time is limited to the



narrow issue presented, i.e. the authority of the board to accept the award described above.

I conclude for the reasons herein stated that, whether or not the award in question meets acceptable standards of particularity in its finding of facts, such deficiencies do not as a matter of law render the award invalid or insufficient to warrant acceptance by the board.

070-173—December 9, 1970

#### LOCAL LAW ENFORCEMENT OFFICERS

#### MINIMUM FOUNDATION PROGRAM FOR LOCAL LAW ENFORCEMENT OFFICERS, COMPENSATION— INTERPRETATION OF "EXISTING ANNUAL SALARY" PURSUANT TO § 163.552(3), F. S.

To: C. E. Duncan, City Attorney, Tavares

#### QUESTION:

For the purpose of determining the minimum salary to be received by a local law enforcement officer under the minimum foundation program for local law enforcement officers, what payroll period is contemplated by the term "existing annual salary" as delineated in § 3(3) of Ch. 70-200, Laws of Florida [§ 163.552(3), F. S.]?

Specifically, you ask whether the payroll period includes Aug. 1, 1970 or May 1, 1971, the effective date of the act. Section 3(3) of Ch. 70-200, Laws of Florida [§ 163.552(3), F. S.], reads as follows:

"Existing annual salary" means the annual salary being paid to a law enforcement officer by a local unit based on the payroll of such local unit for the pay period which includes August 1, 1970, or each respective August 1 thereafter. (Emphasis supplied.)

This section provides that the "existing annual salary" is that salary being paid to a law enforcement officer by a local unit based upon that unit's payroll for the pay period which includes August 1, 1970. The pay period including that specific date is the controlling pay period for determining the "existing annual salary."

I direct your attention to § 4(c) of Ch. 70-200, Laws of Florida [§ 163.553(2)(c), F. S.], relating to "existing annual salary" which reaffirms the legislative intent manifest in § 3(3), Ch. 70-200, Laws of Florida [§ 163.552(3), F. S.].

070-174—December 10, 1970

#### TAXATION

#### MUNICIPAL OCCUPATIONAL LICENSE TAXES— STATE AND NATIONAL BANKS—IMMUNITY

To: James J. Keough, Special Counsel, City of Fort Lauderdale

#### QUESTION:

Are banks, state and national, liable for municipal occupational licenses?

Your question is answered in the negative, for banks having their principal offices in Fort Lauderdale.

Public Law No. 91-156 (Dec. 24, 1969) removed the immunity status of national banks from state taxation, except as to taxes on intangible personal property. Effective January 1, 1972, 12 U.S.C. § 548, will read as follows:

For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located.

In the interim, the law provides in part:

... A State or political subdivision thereof may impose any tax which is imposed generally on a non-discriminatory basis throughout the jurisdiction of such State or political subdivision (other than a tax on intangible personal property) on a national bank having its principal office within such State in the same manner and to the same extent as such tax is imposed on a bank organized and existing under the laws of such State.

While states and their political subdivisions are now generally permitted to tax the national banks, Florida falls within application of the savings provision of the new tax law. Public Law No. 91-156 § 3(a). This section provides in part:

... prior to January 1, 1972, no tax may be imposed on any class of banks by or under authority of any State legislation in effect prior to the enactment of this Act unless

(1) the tax was imposed on that class of banks prior to the enactment of this Act, or

(2) the imposition of the tax is authorized by affirmative action of the State legislature after the enactment of this Act [Dec. 24, 1969].

Florida is prevented from imposing the license tax on the national banks at present, since state banks have been granted the same exemptions from taxation that national banks enjoyed in the past. Section 192.54, F. S. Instead of passing a law enabling the state to utilize Public Law No. 91-156, the legislature reenacted its bank exemptions in § 196.27, F. S. The absence of affirmative action by the legislature precludes any state or municipal utilization of the federal permission to tax, except in certain specified categories. The savings provision does not apply to:

- (1) Any sales or use tax complementary thereto,
- (2) Any tax (including a documentary stamp tax) on the execution, delivery or recordation of documents, or
- (3) Any tax on tangible personal property (not including cash or currency), or for any license, registration, transfer, excise or other fee or tax imposed on the ownership, use or transfer of tangible personal property . . . .

Occupational license taxes are not mentioned in any of the enumerated categories. However, even without affirmative action of the legislature, effective January 1, 1972, occupational license taxes will be applicable to banks. This is clearly revealed by the congressional intent expressed in the report of the Senate banking and currency committee. Senate Report No. 91-530 (Nov. 12, 1969). The committee expressly rejected traditional theories, as exemplified in *Bank of America v. Lima*, 103 F. Supp. 916 (D. Mass. 1952), that the national banks were a distinct arm of the federal government entitled to special protection from state taxation. In 13 U.S. Cong. & Ad. News, 2851 (Jan. 20, 1970) the report stated:

Without specifically addressing the question of whether national banks remain, in substance, such a Federal instrumentality, the committee is agreed that there is no longer any justification for Congress continuing to grant national banks immunities from State taxation which are not afforded State banks.

Such intent clearly shows that when the savings provision is no longer applicable, license taxes may be imposed.

While application of the savings provision bars pre-1972 application of municipal taxes, the occupational license tax may be imposed by municipalities after that date under the 1972 version of 12 U.S.C. § 548, coupled with the state authorization of § 167.43, F. S., which provides in part:

The city or town council may raise... by license on professions, business and occupations carried on within the corporation, all sums of money which may be required for the improvement and good government of the city, and for carrying out the powers and duties herein granted and imposed; and enforce the receipt and collection of the same in the manner now provided by the laws of the state for the assessment and collection of state taxes and licenses.

It should be noted that the occupational licenses are also to be issued pursuant to the authority and limitation of § 205.041(2), F. S.:

Incorporated cities and towns may impose such further occupational license taxes of the same kind upon the same subjects as they may deem proper, except when otherwise provided by law. The license taxes so imposed shall not exceed fifty per cent of the state license tax, except as otherwise authorized by law.

070-175—December 10, 1970

#### TAXATION

##### INTEREST ON TAX SALE CERTIFICATES

To: *Jess Mathas, Clerk, Circuit Court, DeLand*

#### QUESTION:

Does the provision in § 197.205, F. S., prescribing the form tax certificate to include interest from the date of the certificate until the following April 1 at the rate of eighteen percent, or at a lower rate bid by a purchaser other than the county, mean that the opening bid at the tax collector's sale is eighteen percent or twelve percent?

The opening bid (or maximum permissible interest) in the case of purchasers other than the county would, because of the provisions of § 197.440, F. S. (formerly § 194.02, F. S.), be at the rate of twelve percent.

The applicable statute is § 197.440, F. S., as amended by § 1 of Ch. 28254, Laws of Florida, 1953, stating:

197.440 Lands sold to purchaser other than county may be redeemed.—

(1) ... Such interest on lands hereafter sold shall be at the rate per annum bid by the purchaser for the period of time

from the date of the certificate, *not in excess of twelve per cent per annum and eight [per cent] per annum for the time after the first year, but not less than five per cent of the face of the certificate.* (Emphasis supplied.)

Section 197.270, F. S. (formerly § 194.45, F. S., originally enacted in 1941 by § 34 of Ch. 20722, Laws of Florida) provides:

**197.270 Redemption or purchase of certificates held by county.**—... [A]ll tax certificates held by the respective counties, that shall be issued in the year 1941 and subsequent years ... [may be redeemed] upon the payment of the amount of such tax certificate or certificates, or such portion thereof as the part to be redeemed or purchased shall bear to the whole with interest thereon and the payment of any and all subsequent unpaid or omitted taxes due on the land to be redeemed or purchased with interest thereon at the rate of eighteen per cent per annum for the period of time from the date of the certificate until April 1st of the year following the date of said certificate, and eight per cent per annum for the time thereafter but not less than five per cent of the face of the certificate. ...

Section 197.205[§ 193.59], F. S. (last amended substantively by § 7, Ch. 22079, Laws of Florida, 1943), provides that tax certificates "shall be substantially in the following form," and contain in the form a provision for "interest thereon from the date of this certificate until April 1st following at the rate of eighteen per cent per annum (or at such lower rate of interest as may be bid by any purchaser other than the county) and at the rate of eight per cent per annum thereafter."

Although § 197.205, F. S., refers in the prescribed tax certificate form to a maximum interest rate of eighteen per cent, it would appear to be controlled, insofar as applicable to certificates sold to purchasers other than a county, by the 1953 amendment to § 197.440, F. S. (Ch. 28254, Laws of Florida, 1953), specifically changing the maximum rate of interest for those certificates from eighteen to twelve per cent. Attorney General Opinion 053-168, July 24, 1953, Biennial Report of the Attorney General, 1953-1954, p. 227, reaches a similar conclusion with respect to the effect of this 1953 amendment, considered in conjunction with § 193.51 (§ 197.081), F. S., providing for eighteen per cent interest between the date of tax delinquency and date of issuance of a tax certificate. Although AGO 053-204, Aug. 19, 1953, Biennial Report of the Attorney General, 1953-1954, p. 240, stated that § 194.02 (now 197.440), F. S., was applicable to all tax sale certificates, I believe upon reconsideration that this section was clearly limited by the 1941 amendatory act, § 19, Ch. 20722, Laws of Florida, to apply only to lands sold to purchasers other than the county. That conclusion is, in my opinion, required by a consideration of the provision in § 197.270 (formerly § 194.45, F. S., also originally enacted in 1941 by § 34 of Ch. 20722, Laws of Florida) requiring interest on certificates held by the county to be calculated at eighteen per cent from the date of the certificate until the following April 1.

In summary, a construction of all the statutes above-cited in context indicates that tax certificates sold to a purchaser other than a county will bear interest at the rate bid provided such rate may not be more than twelve per cent for the period from the date of issue until the following April 1; certificates held by the county should bear interest at eighteen per cent for such period; and delinquent taxes prior to sale of a certificate (together with subsequent and omitted taxes) shall bear interest at eighteen per cent (AGO 054-173, July 15, 1954, Biennial Report of the Attorney General, 1953-1954, p. 234).



070-176—December 14, 1970

## GOVERNOR AND CABINET

USE OF INAUGURAL EXPENSE MONEYS—CH. 70-1006,  
LAWS OF FLORIDA*To: Tom Adams, Secretary of State, Tallahassee*

## QUESTION:

May the funds appropriated under the provisions of Ch. 70-1006, Laws of Florida, be used to defray the costs associated with the inaugural ceremonies?

Chapter 70-1006, Laws of Florida, provides in part:

Section 4. There is hereby established an inauguration expense fund for the use of the governor-elect in planning and conducting the inauguration ceremonies. The governor-elect shall appoint an inauguration coordinator and such staff as necessary to plan and conduct the inauguration. Salaries for the inauguration coordinator and his staff shall be determined by the governor-elect and shall be paid from the inauguration expense fund. . . .

The inauguration of the governor is an unusual governmental activity. The activities surrounding the inauguration have become, by tradition, public activities, the cost of which no newly elected governor could be expected to bear personally.

In the past, the expenses of the inauguration have been borne by donations from governmental agencies and by donations from private individuals and groups. In adopting Ch. 70-1006, Laws of Florida, the legislature established a public fund whereby the governor would not have to contribute to the expenses of his inauguration either personally or from solicited funds so as to become beholden to others. It is clear that the legislature "established an inauguration expense fund for the use of the governor-elect in planning and conducting the inauguration ceremonies."

070-177—December 16, 1970

## TAXATION

FINALITY OR CERTIFICATION OF INTANGIBLE TAX  
ASSESSMENT BY BOARD OF ADJUSTMENT—  
ASSESSMENT OF TOTAL ACCOUNTS RECEIVABLE  
OF CORPORATION WITH PRINCIPAL PLACE OF  
BUSINESS IN FLORIDA*To: J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

## QUESTIONS:

1. What authority, if any, does the department of revenue have to pass upon an assessment once it has been approved by the board of equalization and the assessment roll has been certified?

2. Assuming that the department of revenue has authority to pass upon an assessment after it has been approved by a board of equalization, should the total accounts receivable of a corporation whose principal place of business is within this state be taxed as Class D intangible personal property?

## STATEMENT OF FACTS:

Accounts receivable in amount of \$21,540,064 were assessed to a corporation with its principal place of business in Dade County as Class D intangibles on the 1968 intangible personal property tax roll for that county. The county tax assessor rejected the taxpayer's claim that the Florida intangible tax could be applied only to 25.65% of the total amount of corporate accounts receivable "based upon sales reports from passenger ticket offices and transportation terminals in the State of Florida compared to the total system." Petition for equalization asserted payment by the corporation of income-franchise-property-intangible taxes in other states in support of the contention that its accounts receivable in the sum of \$15,951,960 are not subject to taxation in Florida.

According to letter of September 30, 1968, from the Dade County attorney, the board of equalization approved the assessor's assessment of all accounts receivable owned by the taxpayer as a corporation with its principal place of business in Florida, "while simultaneously indicating to the taxpayer that it would modify the assessment" in accordance with advice to be requested from the comptroller.

## AS TO QUESTION 1:

Section 199.201, F. S., vests in the department of revenue the authority to ascertain and advise the assessor as to intangible personal property subject to taxation, and provides that it shall have concurrent power to make assessments for *delinquent* taxes. The statute provides also that the assessors shall "enter upon the assessment rolls all intangible personal property certified by the department to be . . . subject to taxation in their respective counties" but expressly limits that statement by a proviso that after the assessment roll has been delivered to the collector, then "a person who should have filed a return or who desires to file an amended return" shall be permitted to do so and upon assessment of "the taxes due" and amendment of the assessment roll, the collector shall "permit him thereupon to pay the tax." (Emphasis supplied.) These provisions would appear to limit such amendments of the assessment roll strictly to the circumstances specified, when *delinquent* taxes may be assessed and paid to avoid accumulation of penalties. Chapter 199, F. S., otherwise provides for assessment "in the same manner as provided" for personal property generally. Section 199.151, F. S. Cf. *Root v. Wood*, Fla. 1945, 21 So.2d 1336.

I conclude therefore that under the circumstances described, the intangible assessment now in question must be controlled by principles governing property tax assessments generally, and that the authority of the department may not be invoked to suspend finality of the assessment after the time prescribed for equalization and certification by the county officers: "... the statute contemplates certification of a single, complete assessment roll which, once endorsed, is not and can not be subject to changes in assessments . . . . And, since the [county] commission may not accomplish by indirection that which it is prohibited from doing directly, the commission may not revise assessments at will merely by withholding certification of a portion of the assessment roll until a later date." *Homer v. Conn. Gen. Life Ins. Co.*, Fla. App. 1968, 211 So.2d 250, 253, *Cert. discharged* 220 So.2d 361; *Allen v. Dickinson*, Fla. 1969, 223 So.2d 310.

## AS TO QUESTION 2:

The assessment approved in the present case appears, in any event, to be proper under the recognized rule that intangible personal property

is taxable at the domicile of the owner in the absence of express or implied statutory exclusion. Numerous Florida cases hold that such a tax may also be imposed on the basis of business situs (*Green v. Burroughs Corp.*, Fla. App. 1962, 137 So.2d 595), but I find no decision excluding a resident's intangibles from taxation here on the ground of business situs elsewhere, and no decision that taxation of a resident corporation's accounts receivable is limited to that portion attributable to intrastate operations. Opinions sustaining the tax on residents' foreign intangibles have referred only by innuendo to the possible effect of active foreign business situs. *Starkey v. Carson*, Fla. 1939, 189 So. 385. Subsequent clarification has been made on the point that taxation elsewhere does not determine the issue: "... taxation or non-taxation in some other state or states does not determine their taxability here." *Gay v. Bessemer Properties*, Fla. 1947, 32 So.2d 587.

The expressed legislative intent is to require return and taxation of all intangible property "which is subject to taxation" as property owned or controlled by a person or corporation in this state. Section 199.101, F. S. Since the intangibles in question are legally *subject* to taxation here (*Curry v. McCanless* 1938, 307 U. S. 357), there appears to be no sound basis for exemption or exclusion. General authorities, noting the single taxation tendency under statutes susceptible of such construction, state unequivocally: "... It is now recognized that there is no constitutional objection to the taxation of intangibles both by the state of the domicile of the owner and by the state in which such property has a 'business situs.'" 51 Am.Jur., *Taxation* § 474.

Among the amendments effected by Ch. 65-389, Laws of Florida, is the omission of that part of § 199.07, F. S., formerly providing "that credit shall be allowed against such taxes for any amount of intangible or income taxes such taxpayer is required to pay to another state" in the case of those becoming residents between Jan. 1 and April 1 of any year. See § 199.101, F. S. for the present provision. Provisions for back assessment of intangibles under § 199.311, F. S., are expressly limited to property which "escaped taxation or has been undervalued." (Emphasis supplied.) The specificity with which such matters have been treated in the statute corroborates my conclusions hereinabove.

070-178—December 21, 1970

#### LOCAL LAW ENFORCEMENT OFFICERS

##### APPLICABILITY OF § § 163.550-163.561, F. S., MINIMUM FOUNDATION PROGRAM TO SECURITY OFFICERS, CAMPUS POLICE, AND DEPUTY CONSTABLES

To: Jack Ledden, Bureau Chief, Police Standards Board, Tallahassee  
QUESTION:

Do the provisions of Ch. 70-200, Laws of Florida, (§ § 163.550-163.561, F. S.), providing for the establishment of a minimum foundation program for local law enforcement officers, apply to security officers, campus police, and deputy constables?

In order for an individual to be eligible to participate in the minimum foundation program for local law enforcement officers, he must be "employed full time by a local unit" and have as his "primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic or highway laws of this state." Section 3(2) of Ch. 70-200, Laws of Florida[§ 163.552(2), F. S.].

A "local unit" is defined as "any municipality or any political subdivision of this state employing law enforcement officers." Section 3(1) of Chapter 70-200, Laws of Florida[ § 163.552(1), F. S.].

"Employment" generally means the act of engaging in one's services and "when used in respect to a servant or hired laborer the term is equivalent to [the act of] hiring, and has but this one meaning when used in the ordinary affairs and business of life." Black's Law Dictionary, Fourth Edition.

The term "security officers" generally identifies those persons employed by private individuals or concerns for the purpose of protecting the property and any other specifically designated interests of their employers. As such, it is evident that the provisions of Ch. 70-200, Laws of Florida(§ § 163.550-163.561, F. S.), authorizing salary supplement payments for local law enforcement officers are not applicable.

Sheriffs and constables are county officers (29A Fla.Jur. *Sheriffs, Constables and Police*, § § 15 and 66) and it should be noted that sheriffs, pursuant to § 30.09(4)(c), F. S., and constables, when clearly authorized by specific legislative enactment, may appoint special deputies for specific guard duties and therefore such deputies may come within the contemplation of "security officers" as designated in your inquiry.

In AGO 070-102 of this publication I held that such special deputies, not receiving pay or remuneration of any kind from the state or any other political subdivision thereof, and not being allowed or called upon to perform any of the ordinary functions of the particular office involved, are not law enforcement officers within the scope and intent of § 23.061(1), F. S., and therefore do not have to comply with the requirements of the police standards act (Ch. 23, part IV, F. S.). It logically follows that such deputies serving as security guards would not be within the contemplation of "local law enforcement officer" as delineated in § 3(2) of Ch. 70-200, Laws of Florida[ § 163.552(2), F. S.], and therefore would not be eligible to participate in the minimum foundation program for local law enforcement officers.

However, there have been occasions where law enforcement officers, particularly deputy sheriffs and municipal police officers, have served as security officers for private individuals and concerns pursuant to lawful authorization therefor. The eligibility of such officers to participate in the minimum foundation program for local law enforcement officers is derived solely from their employment by a municipality or political subdivision of this state and not as a result of any outside private employment.

Your question is answered accordingly as it relates to security officers.

Section 1, Ch. 70-414, Laws of Florida, amending § 239.58, F. S., reads as follows:

(1) The board of regents is hereby authorized and empowered to provide for the appointment, employment, and removal of security personnel for the several institutions and agencies in the university system. *Campus security officers shall meet the minimum standards established by the Florida police standards board for employment and training of police officers; and such officers are hereby vested with all the powers, privileges, and immunities of peace officers while on the property or the roads and streets within the property under the control and jurisdiction of the board of regents. (Emphasis supplied.)*

(2) It is further provided that any officer shall before



entering into the performance of his duties take and file the oath required of peace officers and shall enter into a good and sufficient bond payable to the governor of Florida and his successors in the penal sum of five thousand (\$5,000), with some surety company authorized to do business in this state as surety thereon, conditioned for the faithful performance of his duties.

As noted above, "local unit" means "any municipality or any political subdivision of this state . . ." "Political subdivision" under § 1.01(9), F. S., includes "counties, cities, towns, villages," and districts enumerated therein, but not the state or agencies thereof.

I am advised that some campus security officers are deputy sheriffs directed by the sheriff to perform their duties on particular college campuses throughout the state. The eligibility of such officers to participate in the minimum foundation program for local law enforcement officers stems from their status as deputy sheriffs and not as campus security guards.

Campus security officers contemplated in the statute delineated above, not being employed by a municipality or political subdivision of the state are not within the contemplation of Ch. 70-200, Laws of Florida, and are not eligible for participation in the minimum foundation program for local law enforcement officers.

Your question is answered accordingly as it relates to campus police.

The powers and duties of constables are delineated in § 37.18, F. S. No provision for the appointment of deputy constables is included therein. Constables do not have the power to appoint deputies absent specific legislation to the effect. See AGO 045-209, Aug. 1, 1945, Biennial Report of the Attorney General, 1945-1946, p. 147; AGO 046-124, Apr. 15, 1946, Biennial Report of the Attorney General, 1945-1946, p. 146; AGO 051-278, Aug. 17, 1951, Biennial Report of the Attorney General, 1951-1952, p. 61; AGO 070-102, Aug. 7, 1970, of this publication.

Constables, like sheriffs and deputy sheriffs, are peace officers in Florida (29A, § 1 Fla.Jur. *Sheriffs, Constables and Police*) and are county officers. As noted above, deputy constables possess only those powers clearly delineated by specific legislation.

However, in providing for the employment of deputy constables, the legislature generally contemplates the selection of persons who will possess and exercise the powers of the constable in a manner analogous to the selection of deputy sheriffs who will possess and exercise the powers of the sheriff, except, of course, the power to appoint deputies. This intent is manifested by Ch. 69-630, Laws of Florida, which amends § 1 of Ch. 65-591, Laws of Florida, and provides for the appointment of deputy constables in counties having a population of between 230,000 and 300,000 according to the latest official decennial census.

In such counties, "the constable of each district is authorized to employ persons to act as law enforcement officers to serve under the supervision, direction, and control of the constables . . . All such persons employed shall be deputized by the constables of the districts in such counties and shall be known as deputy constables." (Emphasis supplied.) (§ 1 of Ch. 69-630, Laws of Florida.)

Sections 2 and 3 of Ch. 65-591, Laws of Florida, indicate the general scope of duties to be performed by deputy constables and the method of compensation for the performance of such duties. These sections read as follows:

Section 2. The duties of the deputy constables and the fees or commissions for services performed by said deputies shall be the same as those authorized by law to be performed and collected by the constable, provided, however, that the fees or commissions received by the deputy constable for all services performed shall be paid over to the constable and made a part of the fee receipts income of the constable's office.

Section 3. The salaries to be paid the deputy constables shall be fixed and set by the board of county commissioners of the applicable county on the basis of the needs of the county, but such earnings shall not exceed the compensation allowed by law to the constable.

From the provisions noted above, it would appear that insofar as the deputy constables are authorized to act as law enforcement officers, these officers are within the definition of "law enforcement officers" as delineated in § 3(2) of Ch. 70-200, Laws of Florida[ § 163.552(2), F. S.], and would be eligible for participation in the minimum foundation program, assuming there is compliance with the other provisions of the act.

However, careful consideration must be given to each legislative enactment creating deputy constables, since the language therein will control as to whether such deputy constables are in conformance with the definition of "law enforcement officers" in § 3(2), Ch. 70-200, Laws of Florida[ § 163.552(2), F. S.].

Your question is answered accordingly as it relates to deputy constables.

070-179—December 21, 1970

#### TAXATION

##### MUNICIPAL TAXES—ASSESSMENT BY COUNTY TAX ASSESSOR—DETERMINATION OF MUNICIPAL LANDS SUBJECT TO TAXES—CONSTRUCTION OF § § 167.433 AND 167.435, F. S.

To: W. R. Scott, City Attorney, Stuart

#### QUESTION:

When municipal property tax assessments are made by the county tax assessor under the terms of Ch. 69-54, Laws of Florida(§ § 167.433-167.439, F. S.), does the city have any right to instruct the tax assessor, insofar as city taxes alone are concerned, as to whether or not a certain tract of land should be on the tax roll?

In my opinion the provisions of Ch. 69-54, Laws of Florida, now appearing as § § 167.433-167.439, F. S., require that the question be answered in the negative, insofar as the question may imply that the "right to instruct" would be conclusive on the question of inclusion of property on the tax roll.

The primary provision of the law in question is that stated in part in § 167.433(2), F. S.:

The county tax assessor, in addition to his other duties, shall assess all property subject to taxation under the constitution and general laws of this state, which property is located within a municipality within the county. . . . (Emphasis supplied.)

It is clear that the determination of what property within a municipality shall be subject to taxation is to be made under "general laws of this state," and under § 167.435, F. S., all taxes assessed under the tax assessment rolls "shall be governed by the general laws relating to county taxes." (Emphasis supplied.) The statute does not expressly or by implication reserve to the municipality the right to designate property to be assessed, and its various provisions appear to me, as I have previously indicated in AGO 070-20 of this publication, to contemplate consolidation of the assessment rolls for all practical purposes. That opinion also refers to the omission from the 1968 State Const. of the language in former Art. IX, § 5, which provided that "the cities and incorporated towns shall make their own assessments for municipal purposes upon the property within their limits . . ."

Although the provision that the county assessor shall assess the property infers primarily a duty to fix value, the definition of the word "assess," Black's Law Dictionary, Rev. 4th Ed., states in part that the word:

In connection with taxation of property, means to make a valuation and appraisal of property, usually in connection with listing of property liable to taxation, and implies the exercise of discretion on the part of officials charged with duty of assessing, including the listing or inventory of property involved, determination of extent of physical property, and placing of a value thereon. . . .

For the reasons above-stated, I conclude that in the assessment of property within a municipality under Ch. 69-54, Laws of Florida (§§ 167.433-167.439, F. S.), the determination of what property is subject to taxation should be made by the county tax assessor under the general laws of this state.

070-180—December 21, 1970

#### REGULATION OF PROFESSIONS AND VOCATIONS

##### PRACTICE OF VETERINARY MEDICINE—§§ 474.031(10), (11)(c), (e) AND 474.44, F. S.

To: *C. E. Dee, President, Florida Board of Veterinary Medicine,  
Hollywood*

#### QUESTION:

Does the manual procedure for the medical diagnosis of the sterility of animals and its etiological causes, commonly known as "bull testing," constitute the practice of veterinary medicine?

One of my predecessors in office, Honorable Richard W. Ervin, rendered an Opinion AGO 061-145, Sept. 13, 1961, Biennial Report of the Attorney General, 1961-1962, p. 244, wherein the question was answered in the negative. In replying to the inquiry he relied upon § 474.07, F. S., defining the practice of veterinary medicine, and a letter from Dr. A. C. Warnick, associate physiologist, department of animal science, University of Florida, as to particular techniques then used to determine the fertility of a bull.

However, in 1965 the legislature enacted Ch. 65-238, Laws of Florida, which was a complete revision of the veterinary medical practice act. In § 474.031(11)(c) and (e), F. S., the definition of the practice of veterinary medicine was written to include specifically the procedure, commonly called "bull testing," as follows:

(11) "Practice of veterinary medicine" shall include, but not be limited to, the following practices by any person who:

\* \* \* \* \*

(c) Performs any manual procedure for the diagnosis or treatment for sterility or infertility of animals.

\* \* \* \* \*

(e) *Offers, undertakes* or holds himself out as being able to *diagnose*, treat, operate or prescribe for *any animal* disease, pain, injury, deformity or *physical condition*. (Emphasis supplied.)

Section 474.031(10), F. S. provides in the last sentence thereof that:

Veterinary dentistry, cosmetic surgery and *physical examination of animals shall be considered a part of veterinary medicine*. (Emphasis supplied.)

In view of the fact that since the rendition of AGO 061-145 in 1961, mentioned above, the legislature has changed the law upon which the opinion was based, your question is answered in the affirmative, except, of course, as to the exemptions contained in § 474.44, F. S.

070-181—December 21, 1970

#### LAW ENFORCEMENT OFFICERS—FIREARMS

#### AUTHORITY OF STATE ATTORNEY AND ASSISTANT STATE ATTORNEY TO CARRY FIREARMS WITHOUT PERMIT

To: Fred D. Leone, Assistant State Attorney, Sanford

#### QUESTION:

Does the law permit the state attorney and his assistant state attorneys to carry concealed weapons in their circuits without obtaining a permit from the county commissions in each county of the circuit?

Section 790.051, F. S., provides that:

790.051 Exemption from licensing requirements; law enforcement officers.—*Law enforcement officers are exempt from the licensing and penal provisions of this chapter when acting at any time within the scope or course of their official duties or when acting at any time in the line of or performance of duty.* (Emphasis supplied.)

The "licensing" provision from which said statute exempts law enforcement officers when acting within the scope of their official duties is found in § 790.05, F. S., which makes it unlawful for a person to carry around with him or have in his manual possession in any county a pistol, winchester rifle, or repeating rifle without having a license from the county commissioners of that county.

The pertinent "penal" provisions referred to in § 790.051, F. S., are the penal provisions of §§ 790.05 and 790.01, F. S., relating to carrying concealed weapons and concealed firearms.

Section 790.001(8)(f), F. S., reads as follows:

(8) "Law enforcement officer" means:

\* \* \* \* \*



(f) All *state attorneys, United States attorneys, county solicitors, and county prosecutors and their respective assistants and investigators.* (Emphasis supplied.)

Therefore, state attorneys and assistant state attorneys are "law enforcement officers" within the purview of §790.051, F. S., and it follows that they may carry weapons, whether concealed or not, without obtaining a license from any board of county commissioners "when acting at any time within the scope or course of their official duties or when acting at any time in the line of or performance of duty."

070-182—December 21, 1970

### TAXATION

#### LIABILITY OF ESTATES ESCHEATED TO THE STATE PURSUANT TO §731.33, F. S., TO PAY TAXES IMPOSED BY CH. 198, F. S.

To: *J. Ed Straughn, Executive Director, Department of Revenue, Tallahassee*

#### QUESTIONS:

1. Is an estate which escheats to the State of Florida in accordance with §731.33, F. S., of the Florida Probate Law, liable for estate taxes under Ch. 198, F. S.?

2. If an escheated estate is liable for taxes under Ch. 198, F. S., must the personal representative of such estate first pay to the department of revenue the taxes due thereon before he deposits the proceeds of such estate with the treasurer of the state as provided in §731.33, F. S.?

Both questions should in my opinion be answered in the affirmative.

#### AS TO QUESTION 1:

Section 198.02, F. S., reads as follows:

**198.02 Tax upon estates of resident decedents.**—A tax is imposed upon the transfer of the estate of every person who, at the time of death, was a resident of this state, the amount of which shall be a sum equal to the amount by which the credit allowable under the applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to the several states shall exceed the aggregate amount of all constitutionally valid estate, inheritance, legacy and succession taxes actually paid to the several states of the United States (other than this state) in respect to any property owned by such decedent or subject to such taxes as a part of or in connection with his estate.

The tax under Ch. 198, F. S., is clearly imposed upon the "transfer of the estate," and is not concerned with the manner of distribution. Section 198.01(4), F. S., states that when used in Ch. 198, the word "transfer" shall be taken to include "the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift or appointment in the manner herein described." Although the statutory definition does not specifically refer to an "escheat," it would appear that the legislature, in defining the word "transfer," intended that there be no question as to the inclusion of the enumerated

transfers, the terminology being susceptible of broad construction. Black's Law Dictionary, Rev. 4th Ed. (1968), defines the noun "transfer" as "an act of the parties, or of the law by which the title to property is conveyed from one person to another." Such a definition would seem to apply equally as well to an "escheat" as it would to the more usual methods by which property passes to another, in possession or enjoyment.

Although the basic question you have presented is one of first impression in Florida, some light is provided upon the subject by an examination of the manner in which the federal courts have interpreted and applied the federal estate tax laws. As a matter of fact, such inquiry is quite proper since §198.35, F. S., entitled "Interpretation and construction" provides the following:

When not otherwise provided for in this chapter, the rules of interpretation and construction applicable to the estate and inheritance tax laws of the United States shall apply to and be followed in the interpretation of this chapter.

In what appears to be the only federal decision upon this issue, *Senft v. United States*, 319 F.2d 642 (3rd C.C.A. 1963), the holding of the court was that the descent of property to the Commonwealth of Pennsylvania under its intestacy laws was not an exempt transfer within the meaning of 26 U.S.C.A. §2055(a) which provides, in effect, for the exemption from federal estate taxes "of all bequests, legacies, devises, or transfers . . . to or for the use of . . . any State . . ." The court stated that in order to qualify for such an exemption there must be a voluntary transfer, testamentary in character, made by the decedent. The court, in denying such exemption and affirming the tax imposed, held by necessary implication that an "escheat" was a transfer within the meaning of 26 U.S.C.A. §2001, which provides for the imposition of an estate tax, "on the transfer of the taxable estate, determined as provided in §2051 of every decedent . . ." In the *Senft* case, there was absent a voluntary transfer, testamentary in character, so as to qualify for the statutory exemption. There was still present a transfer within the meaning of 26 U.S.C.A. §2001. The court in announcing its decision also referred to the well settled proposition of law that statutory exemptions from estate taxes should be strictly construed against the taxpayer; that exemptions are the exception, are not favored, and will not be presumed or granted by implication. See also C.J.S., *Taxation* §225.

From a review of decisions rendered by other federal courts, it would appear that the conclusion reached by the *Senft* court would be upheld or followed if the same issue were again presented. In *Helvering v. St. Louis Union Trust Co.*, 1935, 296 U.S. 39, 56 Sup.Ct. 74, 80 L.Ed. 29, 100 A.L.R. 1239, the Supreme Court stated that the event which gives rise to the transfer tax was the death of the deceased with the resulting transfer of the estate by will or intestacy law. It has also been said that the federal estate tax is not a tax imposed upon the property itself, but is an "excise" tax upon the transfer of or shifting in relationships to such property at death. *U.S. Trust Co. of New York v. Helvering* 1939, 307 U.S. 57, 59 Sup.Ct. 692, 83 L.Ed. 1104. And, in perhaps a more succinct manner, it is said that the federal estate tax is a tax upon the interest which is cut off or ceases by reason of the death of the deceased. *Allen v. Henggeler* 1929, 32 F.2d 69, cert. den. 280 U.S. 594, 50 Sup.Ct. 40, 74 L.Ed. 642; *Continental Illinois National Bank & Trust Co. of Chicago v. United States*, 1968, 403 F.2d 721, 185 Ct.Cl. 642. Since the federal courts have held that a transfer by operation of law via the intestacy laws of a state is a transfer within the

meaning of 26 U.S.C.A. § 2001, it would therefore follow that an escheat is such a transfer, since in the case of decedents' estates our escheat statute applies to intestate property and may for this purpose be considered a part of the intestate laws of this state. See § 731.33(1), F. S. Your first question is therefore answered in the affirmative.

#### AS TO QUESTION 2:

Section 731.33(6), F. S., provides: "Except as herein provided, escheated estates shall be administered as in other cases." Section 198.26, F. S., provides that there is to be no final discharge of any executor of an estate until the taxes due under Ch. 198 are paid. No exception is allowed under such section. Section 198.23, F. S., provides that if an executor should make distribution of the property of an estate without having paid the tax due thereon, he is to be held personally liable for the payment of the tax. I believe that your second question must accordingly be answered in the affirmative.

My reasoning above would also appear to be substantiated by a consideration of the provisions of § 731.33(4), F. S., under which private claims may be made against escheated estate funds for a period of twenty years.

I conclude therefore that an estate which escheats under § 731.33, F. S., is liable for estate taxes under Ch. 198, F. S., and the personal representative must first pay to the department of revenue the taxes due thereon before he deposits the proceeds of such estate with the treasurer as provided in § 731.33, F. S.

070-183—December 22, 1970

#### MUNICIPALITIES—CLEWISTON

##### POWERS—ADOPTION OF ORDINANCES AUTHORIZING ISSUANCE OF SEARCH WARRANTS BY CITY JUDGE—CONSTRUCTION OF ART. VIII, § 2(b), STATE CONST.

To: Jack J. Rafter, Jr., City Attorney, Clewiston

#### QUESTION:

When neither general nor special act of the legislature authorizes the municipal judge of the city of Clewiston to issue search warrants, does Art. VIII, § 2(b) State Const. and or Ch. 69-33, Laws of Florida (§ 167.005, F. S.), empower said city to adopt ordinances authorizing the issuance of municipal search warrants by such judge?

Prior to the adoption of the 1968 State Const., a municipal judge could not issue search warrants unless he was authorized to do so by legislative enactment. *Farragut v. City of Tampa* 1945, 22 So.2d 645, 646.

However, in 1968, the voters of Florida adopted a new constitutional Art. VIII, § 2(b), providing that:

**POWERS.** *Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective. (Emphasis supplied.)*

This constitutional provision gives the City of Clewiston the right to exercise *any power whatsoever for municipal purposes*, regardless of its kind or nature, except as otherwise provided by law.

Is the issuance of search warrants "for municipal purposes"? I think that it is. In *State v. McDavid* 1941 200 So. 100, 102, the Supreme Court of Florida had the following to say with respect to what constitutes a "municipal purpose":

The time was when a municipal purpose was restricted to police protection or such enterprises as were strictly governmental but that concept has been very much expanded and a municipal purpose may now comprehend *all activities essential to the health, morals, protection, and welfare of the municipality*. . . (Emphasis supplied.)

It appears from such pronouncements that the exercise of any power by a municipality is for a municipal purpose when such exercise is essential to the health, morals, protection and welfare of such municipality. I think it apparent that the exercise of the power to provide for the issuance of search warrants is essential to the health, morals, protection and welfare of such municipality. Therefore, I am of the opinion that the enactment of an ordinance conferring upon the municipal judge authority to issue search warrants is the exercise of a power for municipal purposes.

There appears to be no law which would bring the exercise of such power by the City of Clewiston within the exception contained in said Art. VIII, § 2(b), State Const., "except as otherwise provided by law."

Consequently, it is my opinion that said constitutional provision empowers the City of Clewiston to adopt an ordinance authorizing its municipal judge to issue search warrants.

As to Ch. 69-33, Laws of Florida (§167.005, F. S.), it does not mention search warrants and does not add to, or subtract from, the power of the City of Clewiston to provide for the issuance of municipal search warrants.

In conclusion, your question is answered in the affirmative because of the provisions of Art. VIII, § 2(b), State Const.

070-184—December 23, 1970

#### MUNICIPALITIES

##### POWER TO IMPOSE OCCUPATIONAL LICENSES ON RETAIL INSTALLMENT SELLERS—CONSTRUCTION OF TERMS "RETAIL SELLER," "RETAIL INSTALLMENT CONTRACT," AND "REVOLVING ACCOUNT"

To: Dean Andrews, City Attorney, Fort Lauderdale

#### QUESTIONS:

1. Are municipalities preempted from enacting an occupational license tax upon the business of retail sellers engaged in retail installment sales, in view of the fact that the state regulates and licenses such business pursuant to Ch. 520, part II, [§ § 520.30-520.42], F. S.?

2. If municipalities have the power to impose an occupational license tax upon such business, do the provisions of § 205.401 or § 205.041, F. S., limit the amount of tax properly imposed by the municipality? Would the City of Fort Lauderdale be limited in its occupational license tax to the amount of \$2.50 per location pursuant to Ch. 520, part II, and § 205.041, F. S.?



3. With regard to businesses such as interstate petroleum products companies which operate within the state and within the City of Fort Lauderdale by selling their products and merchandise to independent contractors or jobbers who individually own and maintain station facilities:

a. Would the parent company, as opposed to the independent contractor, be liable for such tax as a retail seller when, in fact, he is selling at wholesale to the independent contractor for resale to the consumer?

b. Does the use of a national credit card by a customer wherein he is extended credit at no charge, fall within the definition of a retail installment sales contract or revolving account?

#### AS TO QUESTION 1:

Municipalities are not preempted from enacting an occupational license tax upon the business of retail sellers engaged in retail installment sales under Ch. 520, part II (§§ 520.30-520.42), F. S. There appears to be nothing in the state retail installment sales licensing act to preclude municipal taxation of same.

Authorization for municipal imposition of license taxes is found in § 167.43, F. S. That section reads:

The city or town council may raise, by tax and assessment upon all real and personal property, and by license on professions, business and occupations carried on within the corporation, all sums of money which may be required for the improvement and good government of the city, and for carrying out the powers and duties herein granted and imposed; and enforce the receipt and collection of the same in the manner now provided by the laws of the state for the assessment and collection of state taxes and licenses.

In the instant fact situation, the general authorization in § 167.43, F. S., is not controlling, for the city's licensing and taxing power is granted by special law. In § 15C., Ch. 57-1322, Laws of Florida, the city charter grants "full power and authority" as follows:

To license and tax any and all businesses, occupations, and professions carried on or engaged in... within the corporate limits of the City; to classify and define such businesses, occupations and professions for the purpose of imposing Occupational License taxes or fees....

Under this authority the city can pass an ordinance imposing license taxes upon retail sellers if it deems the measure warranted.

When a city charter is granted by special law, a subsequent general law does not modify its provisions unless such intent is clearly expressed. *Sanders v. Howell* 1917, 73 Fla. 563, 74 So. 802, 804. Since there is no evidence of intent to limit the charter by Ch. 520, part II, F. S., the city is not preempted from taxation in this field.

#### AS TO QUESTION 2:

Section 15C., of the city charter of Fort Lauderdale, Ch. 57-1322, Laws of Florida, provides as follows:

... the amount of such Occupational License Fee shall not be dependent upon nor related to the general State Occupational License for similar classifications, nor the amounts allowed under the general laws for municipalities incorporated under the General State Law. (Emphasis supplied.)

Although imposition of a license on retail sellers pursuant to § 167.43, F. S., would be limited to one half of the state's rate of taxation, this limitation does not control license taxes imposed under city charters granted by special law. *Gillis ex rel. State v. Croft* 1926, 92 Fla. 267, 109 So. 446; *State ex rel., Swift v. Dillion* 1918, 75 Fla. 785, 79 So. 29.

It should be noted that neither § 205.401 nor § 205.041, F. S., applies to the retail installment sales act. Section 205.401, F. S. reads:

Every person engaged in the operation of any business of such nature that no license can be properly required for it under any other provision of this chapter or other law of the state, shall pay a license tax of \$150.00.... (Emphasis supplied.)

Section 205.041(2), F. S., states:

Incorporated cities and towns may impose such further occupational license taxes of the same kind upon the same subjects as they may deem proper, except when otherwise provided by law. The license taxes so imposed shall not exceed fifty per cent of the state license tax, *except as otherwise authorized by law.* (Emphasis supplied.)

The city charter is therefore a contemplated exception to this provision. In the case of *Gillis ex rel. State v. Croft, supra*, it was stated that a city's only limitations under such charter provisions are that the amounts so imposed may not be "so unequal and unjustly discriminating in relation to like conditions as to deny the equal protection of the laws, or... so unreasonably large as to be an arbitrary and oppressive exercise of governmental power." Neither § 205.401 nor § 205.041, F. S., is a limitation on the taxing privileges allowed under the charter which was granted by special law of the state legislature.

#### AS TO QUESTION 3a:

Question 3a. is answered in the negative. Section 520.31(4)-(6), F. S., provides definitions for the terms of the act as follows:

\* \* \* \* \*

(4) "Retail buyer" or "buyer" means a person who buys goods or obtains services from a retail seller in a retail installment transaction and not *principally for the purpose of resale.*

(5) "Retail Seller" or "seller" means a person regularly engaged in, and whose business consists to a substantial extent of, *selling goods to a retail buyer.*

(6) "Retail installment transaction" or "transaction" means a contract to sell or furnish or the sale of or the furnishing of goods or services *by a retail seller to a retail buyer* pursuant to a retail installment contract or a revolving account. (Emphasis supplied.)

Section 520.32(1), F. S., imposes a license and fee as follows:

For the privilege of conducting, engaging in and carrying on the business of *retail seller engaging in retail installment transactions* as defined in this act, there is hereby levied and assessed upon every such retail seller, for each store located and operated within this state for the conduct of such business an annual license fee in the sum of five dollars. (Emphasis supplied.)

The parent company in your question is not a retail seller according to the terms of the act because the independent contractor is not a retail buyer. The contractor buys principally for the purpose of resale. If the sales made by the contractor are in fact retail installment sales then the contractor, not the parent company, would be liable for the tax.

#### AS TO QUESTION 3b.:

Question 3b. is answered in the negative. Chapter 520, part II [§ 520.31(7), (8)], F. S., defines "retail installment contract" and "revolving account" as follows:

\* \* \* \* \*

(7) "Retail installment contract" or "contract" means an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments. It does not include a revolving account or an instrument reflecting a sale pursuant thereto.

(8) "Revolving account" or "account" means an instrument or instruments prescribing the terms of retail installment transactions which may be made thereafter from time to time pursuant thereto, under which the buyer's total unpaid balance thereunder, whenever incurred, is payable in installments over a period of time and under the terms of which a finance charge is to be computed in relation to the buyer's unpaid balance from time to time.

Both of these sections anticipate some sort of charge for the extension of credit. Since the question specifies that there is *no charge* for the use of the national credit card, the transaction would not come within the purview of Ch. 520, part II, F. S. If, on the other hand, there is a finance charge, it might well be subject to the above-named statute. See AGO 070-69, dated June 16, 1970, of this publication.

070-185—December 28, 1970

#### APPROPRIATION OF STATE FUNDS

##### DEFINITION OF "CONTINUING APPROPRIATION"— APPLICABILITY TO § 282.011(1)(b), F. S., FLORIDA POLICE ACADEMY

To: *W. Samuel Tucker, Jr., Secretary, Department of Administration,  
Tallahassee*

#### QUESTION:

Does § 21, Ch. 69-111, Laws of Florida[§ 282.011(1)(b), F. S.], provide for a continuing appropriation from the general revenue fund of the state?

The legislature, in § 216.011(1)(j), F. S., defines continuing appropriation as "an appropriation *automatically renewed without further legislative action, period after period, until altered or revoked by the legislature.*" (Emphasis Supplied.)

Chapter 69-111, Laws of Florida[§§ 23.091-23.107, 282.011(1), F. S.], provides for the raising of revenue and the appropriation thereof for a specific purpose, the establishment and operation of a Florida Police Academy. There is no suggestion of a date of termination in the title or body of said chapter as is the customary expression of legislative intent

in legislation providing for an appropriation for a specific period of time.

Therefore, it is my opinion that, as the establishment and operation of the Florida Police Academy is not intended to be limited to one year or any other period of time, and as Ch. 69-111, Laws of Florida [§ § 23.091-23.107 and 282.011(1), F. S.], in no way suggests an annual appropriation or an appropriation for any other period of time, § 21, Ch. 69-111, Laws of Florida [§ 282.011(1)(b), F. S.], must be interpreted as providing for a continuing appropriation "automatically renewed without further legislative action . . . until altered or revoked by the legislature."

070-186—December 29, 1970

### SALES AND USE TAX

#### EXCLUSION OF COLLISION DAMAGE WAIVER FEE FROM TAXABLE RENTAL FOR VEHICLE PURSUANT TO CH. 212, F. S.

To: *J. Ed Straughn, Executive Director, Department of Revenue,  
Tallahassee*

#### QUESTION:

Should a "collision damage waiver" fee (paid by lessee for lessor's waiver of a contract right to recover for certain loss or damage to a leased vehicle) be included in the "gross proceeds derived from the lease or rental of tangible personal property" by which the tax imposed by § 212.05(3) and (4), F. S., is measured?

I conclude that your question should be answered in the negative because the fee described appears to be severable from and quite unrelated to the rental price paid for use and possession of the leased property, and because such payment is wholly optional and not required as a condition of such lease.

Section 212.05, F. S., levies a tax on such rentals "at the rate of four per cent of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein . . ." The total charges made or gross consideration paid would certainly be the measure by which the tax should be computed. There is also considerable support for the proposition that the parties to such a transaction may by the terms of their contract determine the status of payments thereunder as rent either by express designation or by making such payments an obligatory condition on the use or possession of property under the contract. Attorney General Opinion 070-151, of this publication.

Certainly a lessor may not by designation or apportionment make any conclusive determination on the question of whether gross rental proceeds shall exclude certain charges. Also see § 212.02(4) and (6), F. S. The contract about which you inquire, however, provides for liability by lessee for collision damage to the sum of \$200 under the terms of the usual rental contract form. By an optional addendum to the contract, this liability may be avoided by initialing the following statement:

#### Vehicle Collision Damage Waiver

By His Initial, Customer agrees to pay a fee of \$2 per day or fraction thereof (maximum of \$10 per week), and Lessor agrees to waive all claims against Customer for the first \$200 of



damage by collision to vehicle while it is used, operated or driven in conformity with this Agreement, but notwithstanding payment of said fee, Customer shall be fully liable for all collision damage if vehicle is used, operated or driven in violation of any provision of this Agreement.

Rule 12A-1.07(41), Florida Administrative Code, rules and regulations of the department of revenue, provides "A rental car agency should charge the 4% rental tax to its customers on the total rental charge, including any charge for insurance except for a policy issued to the customer by a licensed insurance company for which a specific charge is made." The contract submitted by you indicates compliance with this rule to the extent of any part of the rental charges which might be attributable to insurance required or obtained by lessor. There seems to me to be no necessity for determining the precise nature of the consideration for which the two dollar waiver fee described above is paid, or whether it is subject to the limitation on insurance exclusion under the rule. It should not in my opinion be regarded as rent on the theory of an expense incurred to make leased property more attractive or valuable under cases holding "there is no basis for apportioning the amount paid for rental and the amount paid for other expenses of the lessor. We have held that all such expenses were incurred in order to make the leased property more attractive and thereby obtain a larger rental therefor." *Grantham Transfer Company, Inc., et al. v. Payton S. Hawes*, Commissioner, Ga. 1969, 169 S.E.2d 290, at p. 297. See also Anno. 100 ALR 2d 1112.

In the absence of explicit judicial guidance, I believe the cited statutes and rule must be construed to exclude a "collision damage waiver" fee (paid by lessee for lessor's waiver of a contract right to recover for certain loss or damage to a leased vehicle) from the "gross proceeds derived from the lease or rental of tangible personal property" by which the tax imposed by § 212.05(3) and (4), F. S., is measured.

070-187—December 29, 1970

#### LAW ENFORCEMENT OFFICERS

#### CONCEALED WEAPONS—AUTHORITY OF JUSTICE OF THE PEACE TO CARRY CONCEALED WEAPONS WITHOUT PERMIT

To: K. G. Bailey, *Justice of the Peace, Hastings*

#### QUESTION:

May a justice of the peace carry a concealed weapon without obtaining a license from the board of county commissioners?

Article V, § 25, State Const., provides that:

SECTION 25. Judicial Officers as conservators of the peace. All judicial officers in this state shall be conservators of the peace. (Emphasis supplied.)

Being a judicial officer, a justice of the peace is a conservator of the peace. In AGO 070-167 of this publication, I concluded that a circuit judge, being a judicial officer and therefore a conservator of the peace, is a "law enforcement officer" within the contemplation of § 790.001(8)(a) and (e), F. S. Upon the basis of the authorities cited in said opinion, I conclude that a justice of the peace, being a judicial officer and hence a conservator of the peace, is likewise a "law

enforcement officer" within the purview of § 790.001(8)(a) and (e), F. S. Section 790.051, F. S., provides that:

*Exemption from licensing requirements; law enforcement officers.—Law enforcement officers are exempt from the licensing and penal provisions of this chapter when acting at any time within the scope or course of their official duties or when acting at any time in the line of or performance of duty. (Emphasis supplied.)*

The "licensing" provision from which said statute exempts law enforcement officers when acting within the scope of their official duties is found in § 790.05, F. S., which makes it unlawful for a person to carry around with him or have in his manual possession in any county a pistol, winchester rifle, or other repeating rifle without having a license from the county commissioners of that county.

The pertinent "penal" provisions referred to in said § 790.051, F. S., are the penal provisions of said § 790.05, F. S., and the penal provisions of § 790.01, F. S., relating to carrying concealed weapons and concealed firearms.

The result is that justices of the peace may carry any kind of weapon, whether concealed or not, without obtaining a license from the county commissioners "when acting at any time within the scope or course of their official duties or when acting at any time in the line of or performance of duty."

070-188—December 30, 1970

#### NARCOTIC DRUGS

#### CONVICTION OF AN ADULT FOR THE SALE OF NARCOTIC DRUG TO MINOR—PENALTY—PROBATION— CONSTRUCTION OF §§ 398.22(1)(d)1. AND 948.01, F. S.

To: Charles A. Wade, Circuit Judge, Crestview

#### QUESTION:

When an adult is charged with violating § 398.03, F. S., by selling narcotic drugs to a person who is under the age of twenty-one, and when such adult pleads either guilty or nolo contendere, is it the mandatory duty of the court to adjudge him guilty and sentence him to serve a term of not less than ten years in the state prison instead of withholding the adjudication of guilt and placing such adult on probation?

To begin with, let me point out that a plea of nolo contendere has the same effect, insofar as the case in which it is entered is concerned, as a plea of guilty (Peel v. State, 150 So.2d 281, 290, 291).

Section 398.22(1)(d)1., F. S., requires an affirmative answer to your question. This statutory provision reads thusly:

(d) If the offense consisted of the sale of any narcotic drug in violation of § 398.03, to a person who had not attained the age of twenty-one years at the time of such offense, the offender shall be punished as follows:

1. For a first conviction, imprisonment in the state penitentiary for life or for any number of years not less than 10, and in addition the person convicted may be fined not more than \$10,000.00. *Imposition of sentence shall not be suspended*

*or deferred, nor shall the person so convicted be placed on probation. If the offender shall not have attained the age of twenty-one years and shall not have been previously convicted of any offense under this chapter or chapter 404 at the time of the commission of an offense under this section, he shall upon conviction be imprisoned in the state prison for not more than 10 years or fined not more than \$10,000.00 or both. The license to practice in Florida of any practitioner, as defined in § 398.02(1),(2),(3), or any pharmacist, as defined by § 398.02(6), shall upon conviction be automatically revoked. (Emphasis supplied.)*

Said statutory provision resolutely forbids the placing of the defendant on probation, and therefore probation may not lawfully be granted. It pointedly forbids suspending or deferring the imposition of sentence and this amounts to a command that the court go ahead and impose sentence. Since the court is mandatorily required to impose sentence, and since sentence may not lawfully be imposed without first adjudging the defendant guilty, the court is under the duty to adjudge him guilty in order to comply with the command that the imposition of sentence not be suspended or deferred. And, having adjudged him guilty, the court must sentence him to serve at least ten years in the state prison in order to comply with said statutory provision.

It is true that except for the italicized provision of said § 398.22(1)(d)1., § 948.01, F. S., would authorize the court to withhold the adjudication of guilt and place on probation a person subject to sentence under said § 398.22(1)(d)1., F. S.

However, the italicized provision of § 398.22(1)(d)1., F. S., is the governing law because it was enacted after the last amendment of § 948.01, F. S. Said italicized provision was first inserted into § 398.22(1)(d)1. by Ch. 69-48, Laws of Florida, while § 948.01 has been in its present form since it was last amended in 1967. Said italicized provision is in irreconcilable conflict with § 948.01. Therefore, said italicized provision is now the governing law insofar as its subject matter is concerned under the rule announced by our Supreme Court in *Routh v. Richards* 1931, 138 So. 69, 71, as follows:

*Where two legislative acts are repugnant to or in conflict with each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause. United States v. Tynen, 11 Wall. 88, 20 L.Ed. 153; 36 Cyc. 1073, 25 R.C.L. 917; Jacksonville v. Bowden[1914], 67 Fla. 181, 64 So. 769, L.R.A. 1916D, 1913, Ann. Cas. 1915D, 99. (Emphasis supplied.)*

Said italicized provision of § 398.22(1)(d)1., F. S., is to be regarded as an exception to the provisions of § 948.01, F. S., under the rule stated by our Supreme Court in *State ex rel. Loftin v. McMillan* [1908], 55 Fla. 246, 45 South. 882, we held as follows:

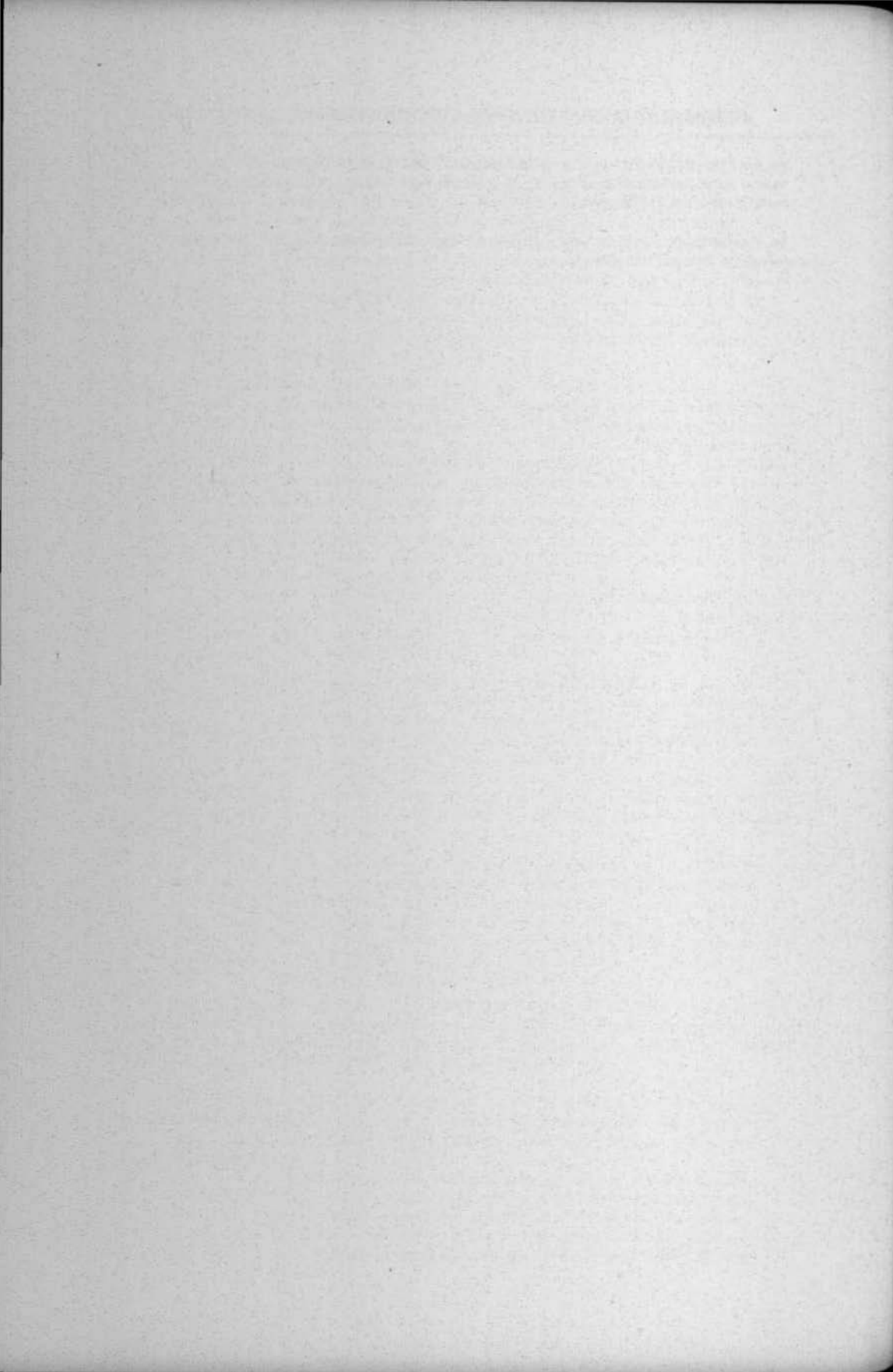
*"Laws should be construed with reference to the Constitution and the purpose to be accomplished, and with reference to other laws in pari materia, though they contain no reference to each other. . . .*

*"Where one statute in comprehensive terms covers a subject, and another later statute embraces only a particular part of the same subject, the two should be construed together, unless a different legislative intent appears; and the statute relating to the particular part of the general subject will operate*

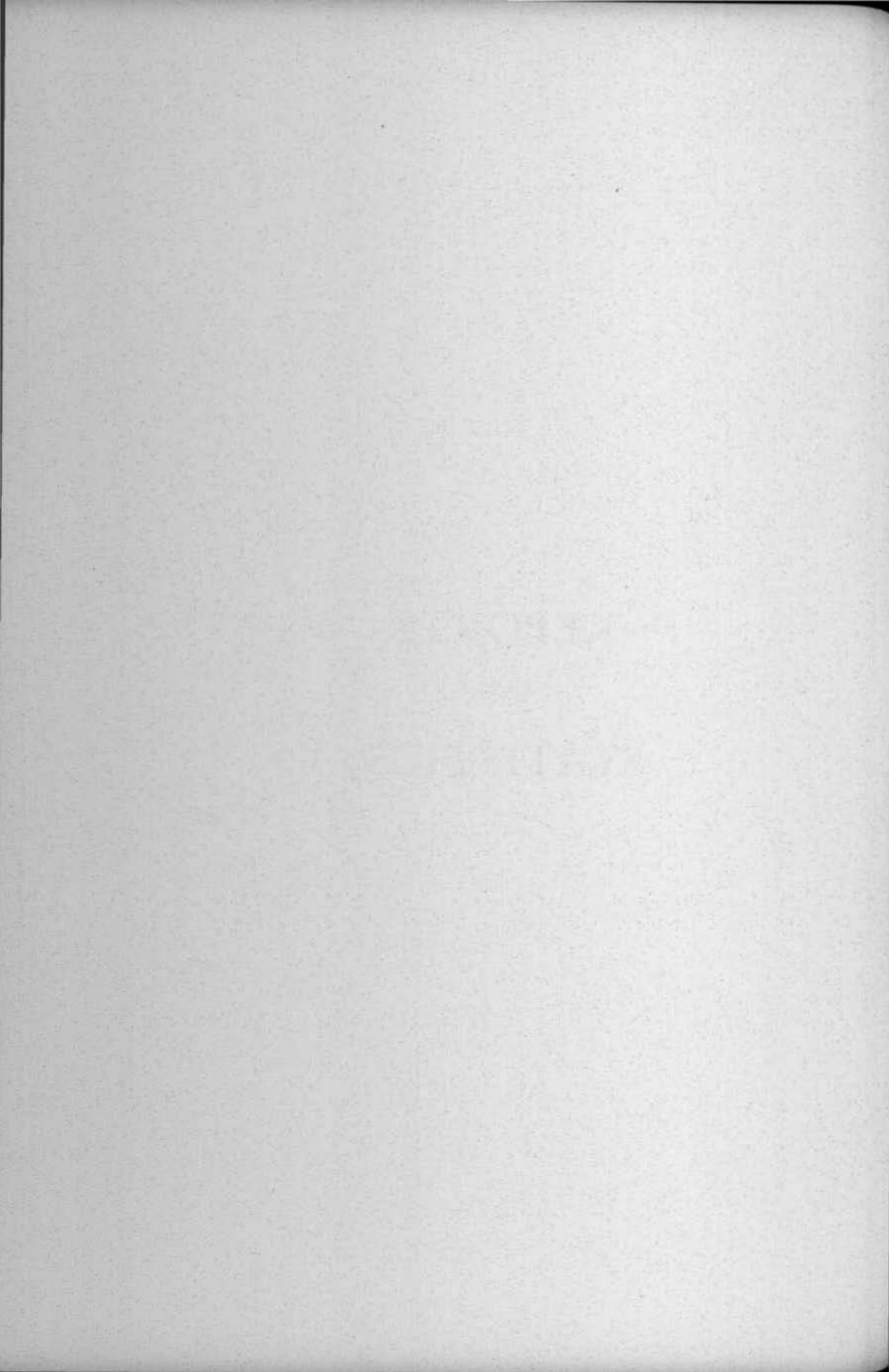
*as an exception to or a qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any."* (Emphasis supplied.)

In conclusion, it is my opinion that your question is properly answered in the affirmative.





**REPORTS**  
**AND**  
**STATISTICS**



## CONSTITUTIONAL AMENDMENTS ADOPTED BY THE 1970 LEGISLATURE

Sections Amended or Added by Resolutions Approved  
at General Election of November 3, 1970

### ARTICLE VII FINANCE AND TAXATION

#### SECTION 14. Bonds for pollution control and abatement facilities.—

(a) When authorized by law, state bonds pledging the full faith and credit of the state may be issued without an election to finance the construction of air and water pollution control and abatement and solid waste disposal facilities (herein referred to as "facilities") to be operated by any municipality, county, district or authority, or any agency thereof (herein referred to as "local governmental agencies"), or by any agency of the State of Florida. Such bonds shall be secured by a pledge of and shall be payable primarily from all or any part of revenues to be derived from operation of such facilities, special assessments, rentals to be received under lease-purchase agreements herein provided for, any other revenues that may be legally available for such purpose, including revenues from other facilities, or any combination thereof (herein collectively referred to as "pledged revenues"), and shall be additionally secured by the full faith and credit of the State of Florida.

(b) No such bonds shall be issued unless a state fiscal agency, created by law, has made a determination that in no state fiscal year will the debt service requirements of the bonds proposed to be issued and all other bonds secured by the pledged revenues exceed seventy-five per cent of the pledged revenues.

(c) The state may lease any of such facilities to any local governmental agency, under lease-purchase agreements for such periods and under such other terms and conditions as may be mutually agreed upon. The local governmental agencies may pledge the revenues derived from such leased facilities or any other available funds for the payment of rentals thereunder; and, in addition, the full faith and credit and taxing power of such local governmental agencies may be pledged for the payment of such rentals without any election of freeholder electors or qualified electors.

(d) The state may also issue such bonds for the purpose of loaning money to local governmental agencies, for the construction of such facilities to be owned or operated by any of such local governmental agencies. Such loans shall bear interest at not more than one-half of one per cent per annum greater than the last preceding issue of state bonds pursuant to this section, shall be secured by the pledged revenues, and may be additionally secured by the full faith and credit of the local governmental agencies.

(e) The total outstanding principal of state bonds issued pursuant to this section 14 shall never exceed fifty per cent of the total tax revenues of the state for the two preceding fiscal years.

*History.*—Added Com. Sub. for H.J.R. 3853 and 4040, 1970; adopted 1970.

### ARTICLE X MISCELLANEOUS

SECTION 11. Sovereignty lands.—The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

*History.*—Am. H.J.R. 792, 1970; adopted 1970.



**COMPILED STATEMENT OF CASES HANDLED  
IN THE ATTORNEY GENERAL'S OFFICE****JANUARY 1, 1969 THROUGH DECEMBER 31, 1969****CRIMINAL CASES**

|                       |                         |
|-----------------------|-------------------------|
| CASES PENDING .....   | 2,455                   |
| NEW CASES—Tallahassee | —607                    |
| Lakeland              | —416                    |
| W. Palm Beach         | —418                    |
| Miami                 | —386                    |
|                       | <u>1,827</u>            |
|                       | TOTAL ... 4,282         |
| CLOSED CASES .....    | <u>1,956</u>            |
|                       | TOTAL PENDING ... 2,326 |

**CIVIL CASES**

|                       |                         |
|-----------------------|-------------------------|
| CASES PENDING .....   | 1,505                   |
| NEW CASES—Tallahassee | —702                    |
| Miami                 | — 33                    |
| Lakeland              | — 5                     |
|                       | <u>740</u>              |
|                       | TOTAL ... 2,245         |
| CLOSED CASES .....    | <u>673</u>              |
|                       | TOTAL PENDING ... 1,572 |

COMPILED STATEMENT OF CASES HANDLED  
IN THE ATTORNEY GENERAL'S OFFICE

JANUARY 1, 1970 THROUGH DECEMBER 31, 1970

## CRIMINAL CASES

|                       |                         |
|-----------------------|-------------------------|
| CASES PENDING .....   | 2,326                   |
| NEW CASES—Tallahassee | -726                    |
| Lakeland              | -539                    |
| W. Palm Beach         | -599                    |
| Miami                 | -488                    |
|                       | <u>2,352</u>            |
|                       | TOTAL ... 4,678         |
| CLOSED CASES .....    | <u>1,746</u>            |
|                       | TOTAL PENDING ... 2,932 |

## CIVIL CASES

|                       |                         |
|-----------------------|-------------------------|
| CASES PENDING .....   | 1,572                   |
| NEW CASES—Tallahassee | -780                    |
| Miami                 | - 45                    |
| Lakeland              | -114                    |
|                       | <u>939</u>              |
|                       | TOTAL ... 2,511         |
| CLOSED CASES .....    | <u>850</u>              |
|                       | TOTAL PENDING ... 1,661 |

## STATISTICAL MAIL DATA

| YEAR | MONTH     | INCOMING | OUTGOING | WORKING DAYS |
|------|-----------|----------|----------|--------------|
| 1966 | April     | 4,069    | 10,267   | 21           |
|      | May       | 4,233    | 3,540    | 22           |
|      | June      | 3,731    | 2,978    | 22           |
|      | July      | 3,798    | 5,987    | 20           |
|      | August    | 2,374    | 3,882    | 23           |
|      | September | 3,671    | 3,007    | 22           |
|      | October   | 4,428    | 2,508    | 21           |
|      | November  | 4,026    | 3,083    | 19           |
|      | December  | 1,720    | 2,149    | 19           |
| 1967 | January   | 4,423    | 3,614    | 21           |
|      | February  | 4,073    | 3,602    | 20           |
|      | March     | 4,876    | 4,674    | 23           |
|      | April     | 4,149    | 3,602    | 20           |
|      | May       | 4,308    | 3,698    | 23           |
|      | June      | 3,923    | 2,650    | 22           |
|      | July      | 3,643    | 2,186    | 19           |
|      | August    | 3,855    | 2,547    | 23           |
|      | September | 3,680    | 5,638    | 20           |
|      | October   | 4,303    | 4,697    | 22           |
|      | November  | 4,770    | 4,095    | 19           |
|      | December  | 5,418    | 2,026    | 19           |
| 1968 | January   | 4,089    | 2,206    | 19           |
|      | February  | 4,368    | 4,510    | 21           |
|      | March     | 7,067    | 5,023    | 21           |
|      | April     | 5,926    | 4,197    | 22           |
|      | May       | 5,151    | 3,547    | 22           |
|      | June      | 3,907    | 2,443    | 20           |
|      | July      | 4,847    | 3,823    | 21           |
|      | August    | 3,956    | 2,274    | 22           |
|      | September | 4,886    | 3,655    | 20           |
|      | October   | 5,195    | 4,543    | 23           |
|      | November  | 4,599    | 1,873    | 18           |
|      | December  | 5,087    | 2,547    | 19           |

As of April 1, 1966, a check was started on incoming and outgoing mail in the Office of Attorney General, no check having been kept prior to that date.)

| YEAR | MONTH     | INCOMING     | OUTGOING     | WORKING DAYS |
|------|-----------|--------------|--------------|--------------|
| 1969 | January   | 5,132        | 3,294        | 21           |
|      | February  | 4,692        | 1,901        | 20           |
|      | March     | 5,385        | 2,929        | 21           |
|      | April     | 5,275        | 3,200        | 22           |
|      | May       | 5,238        | 3,557        | 21           |
|      | June      | 4,798        | 2,699        | 21           |
|      | July      | 4,560        | 3,600        | 22           |
|      | August    | 4,655        | 4,001        | 20           |
|      | September | 4,812        | 3,202        | 21           |
|      | October   | 4,931        | 3,881        | 23           |
|      | November  | 4,601        | 2,866        | 17           |
|      | December  | 5,243        | 4,597        | 20           |
|      |           | <hr/> 59,322 | <hr/> 39,727 | <hr/> 249    |
| 1970 | January   | 4,782        | 3,848        | 20           |
|      | February  | 5,022        | 3,528        | 20           |
|      | March     | 5,845        | 3,362        | 22           |
|      | April     | 5,516        | 4,102        | 22           |
|      | May       | 5,200        | 3,341        | 20           |
|      | June      | 5,309        | 3,747        | 22           |
|      | July      | 5,545        | 4,218        | 22           |
|      | August    | 4,968        | 5,004        | 21           |
|      | September | 5,663        | 3,542        | 21           |
|      | October   | 5,552        | 3,353        | 22           |
|      | November  | 5,630        | 2,941        | 18           |
|      | December  | 5,298        | 3,978        | 20           |
|      |           | <hr/> 64,330 | <hr/> 44,964 | <hr/> 250    |



## OFFICIAL NUMBERED OPINIONS

|      |   |     |
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| 1966 | — | 111 |
| 1967 | — | 92  |
| 1968 | — | 110 |
| 1969 | — | 141 |
| 1970 | — | 188 |

### MONEYS COLLECTED BY OFFICE OF ATTORNEY GENERAL—1970

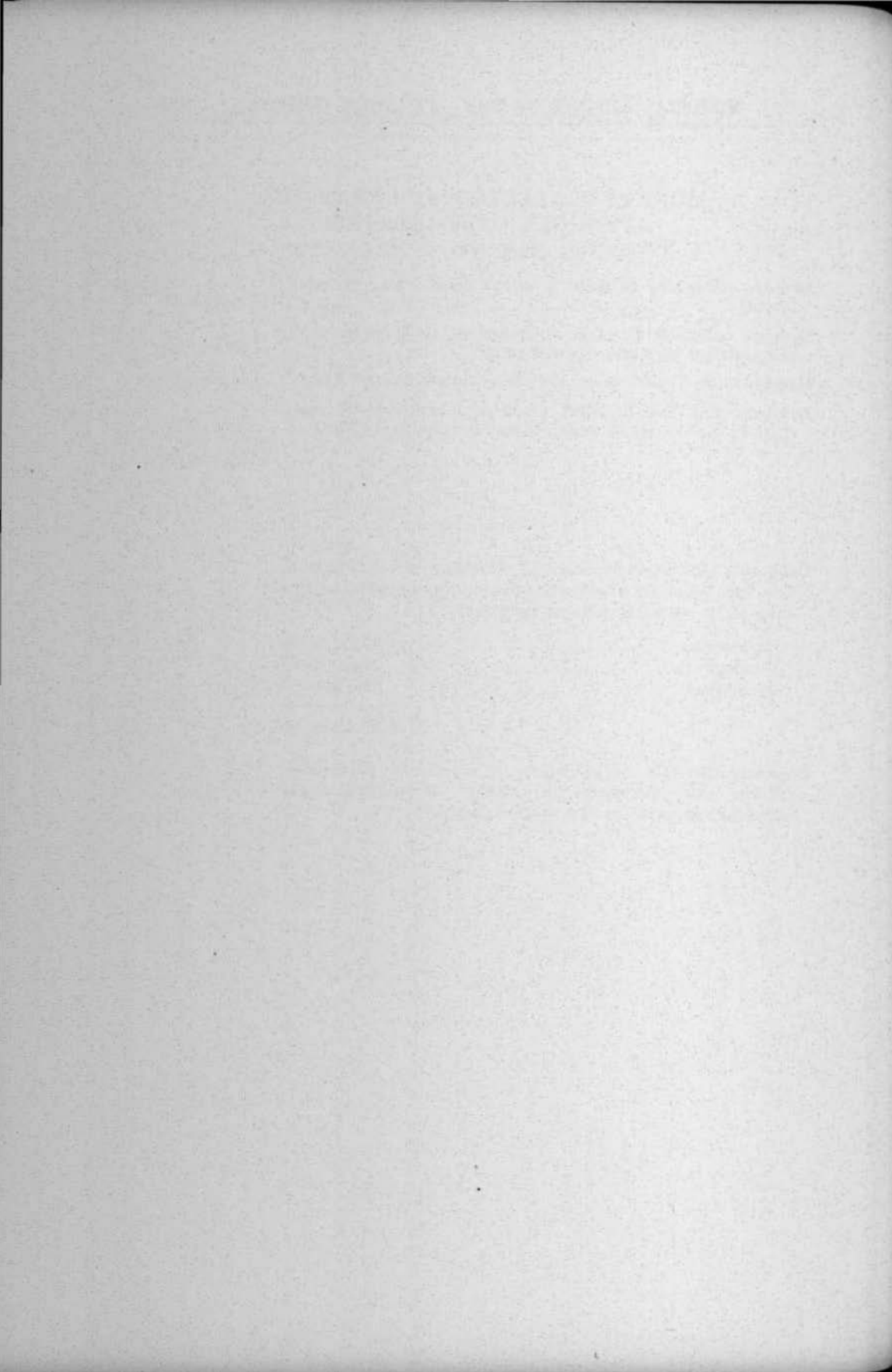
|                                                                                                                    |                     |
|--------------------------------------------------------------------------------------------------------------------|---------------------|
| Moneys escheating to state in estate cases where no heirs found .....                                              | \$170,265.24        |
| Moneys collected through suits against patients in state hospitals for care and maintenance .....                  | 72,357.53           |
| Moneys from Trust Funds, etc., for Council for the Blind .....                                                     | 38,383.54           |
| Antitrust suit filed in 1968, resulting in recovery of more than \$175,000.00, of which State received in 1970 ... | 139,643.55          |
|                                                                                                                    | <u>\$420,649.86</u> |

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Drug suit instituted by State of Florida v. Chas. Pfizer & Co., Inc., et al, in which defendants offered settlement in June 1970, as to Florida, as follows:

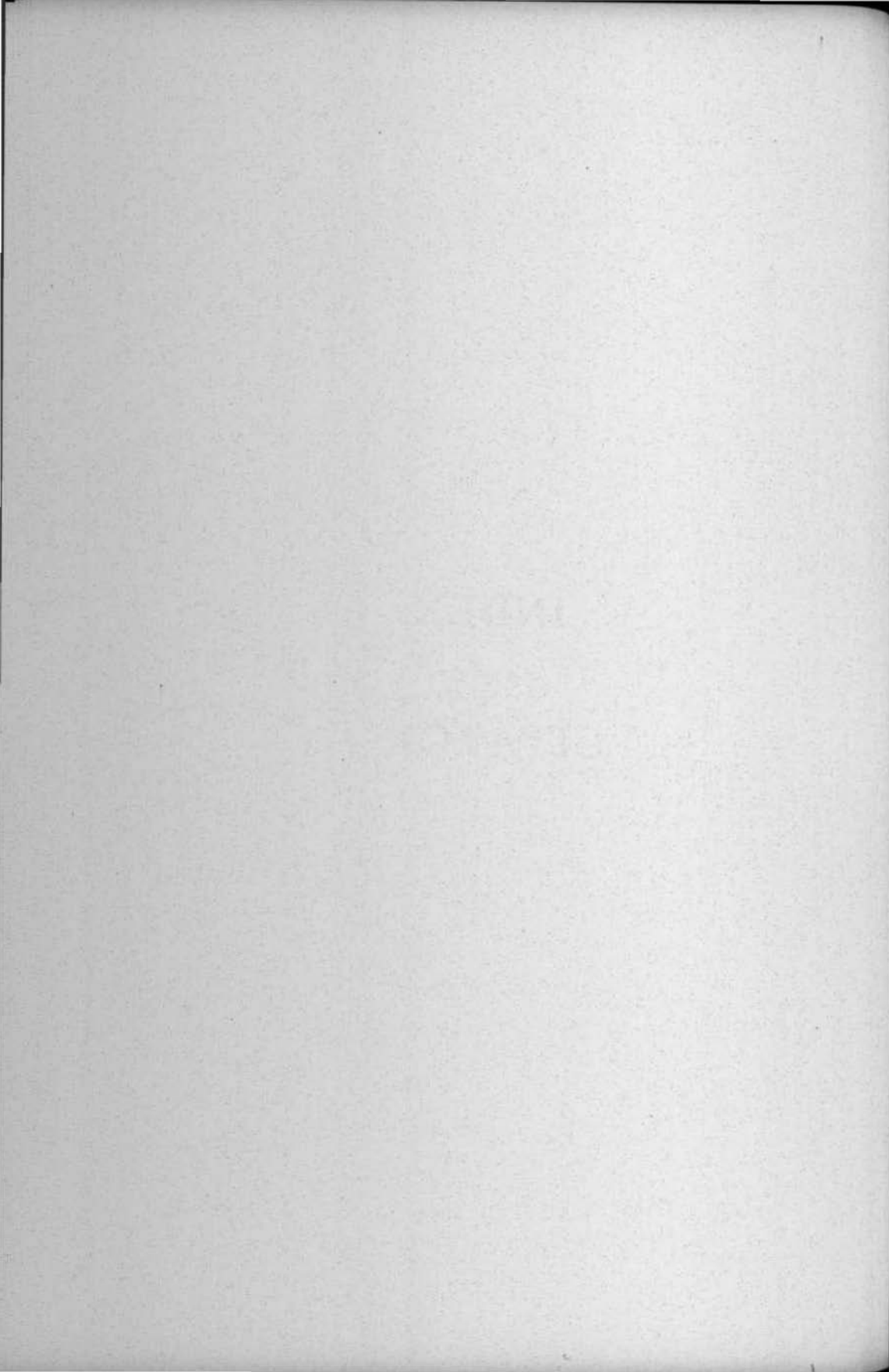
|                    |                       |
|--------------------|-----------------------|
| Institutions ..... | \$1,813,530.00        |
| Vendors .....      | 364,000.00            |
| Consumers .....    | 954,600.00            |
|                    | <u>\$3,132,130.00</u> |

Presently Court's order being appealed by wholesaler-retailer class (vendors) in attempt to receive larger allocation at expense of consumer interests.



**INDEX**  
**AND**  
**CITATOR**





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